

# **A DEMOCRATIC DISCORD**

An Implicit Right to Democracy  
and the Problem of Democratic Decision-Making



Cristine M. Delaney

Supervisor: Nils Butenschøn and Maria Lundberg

Deadline for submission: 06/02/2008

Number of words: 19,977(max. 20.000)

01.06.2008

---

UNIVERSITY OF OSLO

Faculty of Law

## Acknowledgements

I would first and foremost like to thank the Institusjonen Fritt Ord for awarding me a scholarship to fund the writing of this thesis and supplying me with a much appreciated office space. I hope that this work lives up to the potential you saw in it and to your standards.

I would like to sincerely thank both of my advisors Nils Butenschøn and Maria Lundberg for their valued guidance and patience. You have both been of great help to me, and my thesis has benefited from your time and effort.

Thanks also goes to my dearest friend and confidant Maria Dikova who has been of great moral support and who has kept me smiling.

Also, thank you to Michael H. Penn who always asked me how my thesis was going, and was always patient when I answered in great length and detail. Your kindness is so deeply appreciated.

A special thank-you goes to Katrine Vincent, Marianne Rusten, and Tara N. Smith. We have suffered the ups and downs of this process together and I am so happy to have had you as friends and classmates. My thanks extends to Kathinka Furst who has helped to make our working-space so friendly; it has been a pleasure to come in to the office each day.

Finally, and most importantly, I would like to thank my family: Mom, Dad, Kate, James, and beautiful baby Kayla. Your love and support means the world to me and I am so glad that I make you proud. This thesis is dedicated to you...I will be home soon.

TUSEN TAKK!  
Cristine M. Delaney  
2 June 2008  
Oslo, Norway

## One's-Self I Sing

ONE'S-SELF I sing—a simple, separate Person;  
Yet utter the word Democratic, the word *En-masse*.

Of Physiology from top to toe I sing;  
Not physiognomy alone, nor brain alone is worthy for the muse—I say the Form complete is worthier far;  
The Female equally with the male I sing.

Of Life immense in passion, pulse, and power,  
Cheerful—for freest action form'd, under the laws divine,  
The Modern Man I sing.

Walt Whitman  
Leaves of Grass  
1900

## ABBREVIATIONS, SHORTENINGS, AND ACRONYMS

|                     |   |
|---------------------|---|
| ACHR                | American Convention on Human Rights   |
| Art.#               | Article   |
| CERD                | International Convention on the Elimination of All Forms of Racial Discrimination       |
| CESCR               | International Covenant on Economic, Social, and Cultural Rights                         |
| Charter of Paris    | The Charter of Paris for a New Europe   |
| CSCE                | Conference on Security and Co-operation in Europe                                       |
| CoE                 | Council of Europe   |
| Copenhagen Document | Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE |
| ECHR                | European Convention for the Protection of Human Rights and Fundamental Freedoms         |
| ECtHR               | European Court of Human Rights  |
| ESD                 | External Self-Determination   |
| GA                  | General Assembly  |
| GC-#                | General Comment   |
| GR-#                | General Recommendation  |
| Helsinki Summit     | Document of the CSCE Helsinki Summit Meeting  |
| HFA                 | Final Act of The Helsinki Conference  |
| HRA1999             | Human Rights Act 1999 (Norway)  |
| HRC                 | Human Rights Committee  |
| ICCPR               | International Covenant on Civil and Political Rights                                    |
| ICJ                 | International Court of Justice  |
| ISD                 | Internal Self-Determination   |

|                 |   |
|-----------------|---|
| Moscow Document | Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE |
| NAACP           | National Association for the Advancement of Colored People                                |
| OSCE            | Organization for Security and Cooperation in Europe                                       |
| OP              | Optional Protocol   |
| P#-#            | Protocol number- Article number   |
| RUDs            | Reservations, Understandings, Declarations  |
| UDHR            | Universal Declaration of Human Rights   |
| UN              | United Nations  |
| UNCHR           | Human Rights Commission   |

# Content

|                 |  |                  |
|-----------------|--|------------------|
| <b><u>1</u></b> | <b><u>INTRODUCTION</u></b>                                       | <b><u>1</u></b>  |
| <b>1.1</b>      | <b>Research Aim</b>  | <b>1</b>         |
| 1.1.1           | Scope  | 3                |
| <b>1.2</b>      | <b>Methodology</b>   | <b>4</b>         |
| 1.2.1           | Methodology for Chapters 2-5: To Structure Democracy             | 4                |
| 1.2.2           | Methodology for Chapters 6-8: The Demeanor and Role of Democracy | 6                |
| <b>1.3</b>      | <b>Premise: Sovereignty and Legitimacy</b>                       | <b>7</b>         |
| <b><u>2</u></b> | <b><u>WHAT IS DEMOCRACY AND WHERE CAN IT BE FOUND?</u></b>       | <b><u>9</u></b>  |
| <b>2.1</b>      | <b>Core Concepts</b>   | <b>9</b>         |
| 2.1.1           | Democratic Premise   | 9                |
| 2.1.2           | Self-Determination as a Foundation                               | 11               |
| <b>2.2</b>      | <b>Core Standards of Democracy</b>                               | <b>13</b>        |
| 2.2.1           | Effective Participation: Freedom of Speech                       | 13               |
| 2.2.2           | Effective Participation: Assembly and Association                | 15               |
| 2.2.3           | Voting Equality  | 17               |
| 2.2.4           | Enlightened Understanding  | 19               |
| 2.2.5           | Control of the Agenda  | 22               |
| 2.2.6           | Inclusion of Adults  | 22               |
| <b>2.3</b>      | <b>Conclusion of Section</b>                                     | <b>24</b>        |
| <b><u>3</u></b> | <b><u>ACTUAL DEMOCRACY</u></b>                                   | <b><u>26</u></b> |
| <b>3.1</b>      | <b>Elected Officials</b>   | <b>26</b>        |
| 3.1.1           | Elected Officials: ECHR and ICCPR                                | 27               |

|                 |  |                  |
|-----------------|--|------------------|
| <b>3.2</b>      | <b>Free, Fair, and Frequent Elections</b>  | <b>27</b>        |
| 3.2.1           | Free, Fair, and Frequent Elections: ECHR   | 27               |
| 3.2.2           | Free, Fair, and Frequent Elections: ICCPR  | 29               |
| <b>3.3</b>      | <b>Freedom of Expression</b>   | <b>29</b>        |
| <b>3.4</b>      | <b>Alternative Sources of Information</b>  | <b>30</b>        |
| <b>3.5</b>      | <b>Associational Autonomy</b>  | <b>31</b>        |
| <b>3.6</b>      | <b>Inclusive citizenship</b>   | <b>31</b>        |
| <b>3.7</b>      | <b>Conclusion of Section</b>   | <b>32</b>        |
| <b><u>4</u></b> | <b><u>THE ADDED VALUE OF INSTITUTIONAL WORK</u></b>                                      | <b><u>33</u></b> |
| <b>4.1</b>      | <b>Introduction</b>  | <b>33</b>        |
| <b>4.2</b>      | <b>The Relevant Institutions</b>   | <b>33</b>        |
| 4.2.1           | Rule of Law, Democratic Security, Sustainable Development, Racism, and Poverty Reduction | 35               |
| 4.2.2           | The Formulation of Democracy   | 36               |
| <b>4.3</b>      | <b>Conclusion of Section</b>   | <b>37</b>        |
| <b><u>5</u></b> | <b><u>THE CURRENT DEBATE: THE VALUE OF HUMAN RIGHTS DISCOURSE</u></b>                    | <b><u>38</u></b> |
| <b>5.1</b>      | <b>An Emerging Right to Democracy</b>  | <b>38</b>        |
| <b>5.2</b>      | <b>Human Rights as the Basis of the Claim</b>  | <b>39</b>        |
| <b>5.3</b>      | <b>Building a Regime</b>   | <b>40</b>        |
| <b>5.4</b>      | <b>A Right to Claim</b>  | <b>42</b>        |
| <b>5.5</b>      | <b>Moving On</b>   | <b>42</b>        |
| <b><u>6</u></b> | <b><u>PRACTICAL CONSIDERATIONS: HUMAN RIGHTS AND DEMOCRACY IN THE UNITED STATES</u></b>  | <b><u>43</u></b> |

|                 |  |                  |
|-----------------|--|------------------|
| <b>6.1</b>      | <b>Intro</b>   | <b>43</b>        |
| 6.1.1           | The Problem of Implementation  | 44               |
| 6.1.2           | Reasons for the RUDs   | 46               |
| <b>6.2</b>      | <b>Concluding Remarks on the U.S. as a Leader and as an Outlier</b>          | <b>50</b>        |
| <b><u>7</u></b> | <b><u>PRACTICAL CONSIDERATIONS: HUMAN RIGHTS AND DEMOCRACY IN NORWAY</u></b> | <b><u>52</u></b> |
| <b>7.1</b>      | <b>Intro</b>   | <b>52</b>        |
| <b>7.2</b>      | <b>The Problem of Implementation</b>   | <b>53</b>        |
| <b>7.3</b>      | <b>Human Rights in Norwegian Law</b>   | <b>55</b>        |
| <b><u>8</u></b> | <b><u>CONCLUSION</u></b>   | <b><u>58</u></b> |
|                 | <b><u>REFERENCES</u></b>   | <b><u>61</u></b> |



## 1 Introduction

Since 1948 the field of human rights has been growing increasingly powerful and influential in international relations. It has emerged as an indispensable framework for national, international, and transnational actions and policies.<sup>1</sup> Concurrently, the cultivation and spread of democracy has risen to a standard area of discourse and policy in international relations. Despite an international pro-democracy movement,<sup>2</sup> the definition of democracy as a political system remains fragmented and ambiguous.<sup>3</sup> The human rights field, in its increasing strength and importance, has the potential to be a critical tool in the clarification and legitimization of the international democratic movement.

Democracy and human rights are both founded on, and aim to protect the value and dignity of the human person. Democratic theory and systems of democracy secure legitimacy and build sovereignty from this grounding in inherent dignity. Human rights theory and the human rights system also derive power and legitimacy from the inherent dignity of the person, and in doing this reformulate the legitimacy of State sovereignty. When these two conceptions or systems work in tandem the concept of human dignity serves to both build government and check government. It is this dynamism which is the main thread of this discussion.

### 1.1 Research Aim

Largely bypassing the philosophical arguments concerning the core definition of “democracy” the second, third, and fourth chapters locate human rights norms and trends which correlate<sup>4</sup> with democratic principles and which structure the practical boundaries of a common, perhaps even universal, definition of democratic government. These chapters will use human rights law to construct an understanding of a democratic political system which is morally and logically consistent with existing law and with supranational

---

<sup>1</sup> Forsythe (2006)

<sup>2</sup> Franck (2000) p.27

<sup>3</sup> OHCHR *Democracy: Challenges and opportunities*

<sup>4</sup> “Correlation” requires that the concepts have the same founding principles and generally operate in the same framework along the same rules of behaviour.

objectives. In these chapters codified human rights are used in an effort to expose what is already imbedded<sup>5</sup> in the law itself.

Chapter five reviews and concludes the previous chapters. It extracts the main points of the previous chapters and puts them into context with some of the current debates concerning democracy. This section addresses how human rights improve the discourse of, and subsequently the policies of, an international democratic requirement.

Chapters six and seven will explore the country situations of the United States and Norway. It will provide a short overview of the political and legal influences in relation to country-specific notions of democracy and country-specific notions of human rights. The studies will investigate the convergence or divergence of democracy and the international human rights regime in the practical sense; they will pay particular attention to issues concerning ratification and subsequent implementation legislation as well as national conceptions of democratic decision-making.

Chapter eight is the conclusion of the thesis. It will review the discussion in chapter five and will draw out the core findings of chapters six and seven. The first part of the thesis will argue that a human-rights-based approach to democratization is the most valid and cohesive approach to a universal understanding of democracy. Being so, it is also the most comprehensive approach to a right to democracy and/or a democratic entitlement. The country studies however help to illuminate a fundamental tension between democracy, a process which derives its legitimacy from the bottom-up of the power hierarchy, and human rights, which despite being grounded in inherent dignity, is perceived to be at odds with this bottom-up structure. What we find then is that democracy needs a comprehensive definition that derives a good deal of its power and legitimacy from an expansive realm human rights. However, to promote democracy we must be aware of the cracks in the

---

<sup>5</sup> In this context, the word “imbedded” is used in the sense that it is not necessarily the explicit focus or aim of the law, but is an existing element of the law.

conceptual molding and understand the practical ways that these cracks can be plastered over, this will be discussed in reference to the country study of Norway.

### 1.1.1 Scope

Several concessions must be made to accommodate considerations of available time and word-count. The discussion of democratic theory will be quite brief and Robert A. Dahl will be the main theorist drawn from to present the basic outlines of the concept of democracy. Dahl's work has been chosen because it is a very clear and logical approach to a theory of what a modern democracy requires. I will also be making specific and repeated reference to Thomas Franck due to his pivotal work in the area of an emerging right to democratic governance.

Unfortunately, reference to international human rights instruments will be limited to the ICCPR and the ECHR. Both Conventions deal largely with the same rights and are part of the two most developed human rights systems (the UN and the CoE). The work will draw on the Conventions themselves as well as the work of these standard-setting human rights systems (general comments, court cases, recommendations etc). The countries in the country studies are both parties to the ICCPR, only Norway is party to the ECHR but the US has observer status in the CoE. The OSCE will also be used as a source because of its groundbreaking work in this area and because both countries are members.

This paper is not meant to be a prescription for democratic governance or a complete prescription for the direction democratization should take. Neither is the paper a comprehensive critique of the policies and laws of the United States or of Norway. It is also outside the scope of this paper to address how democracy compares and contrasts with other systems of political governance. The aim of the paper is to address the broad concepts of democracy in relation to specific legal norms and comment (in an admittedly limited way) on the general issues related to the understanding of the legitimacy of democracy in relation to issues of sovereignty and international human rights obligations.

## 1.2 Methodology

### 1.2.1 Methodology for Chapters 2-5: To Structure Democracy

The first major issue to be addressed is how democratic theory and democratic governance relate to human rights law. Linkages will be established by drawing on human rights instruments and interpretation of these instruments from both case-law and from expert analysis. The most advantageous legal methodological approach to these sources is through a law-as-process method taken from Rosalyn Higgins' work.

The law-as-process method sees law as;

...decisions [that] are made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms, [this constitutes] *legal* decision-making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed 'rules'.<sup>6</sup>

This theory argues a wider scope of authoritative influence over legality than a positivist view and will set the stage nicely for a discussion on how political theory may influence legality.

Art.38 of the ICJ Statute establishes the hierarchy of applicable sources of legal interpretation putting judicial decisions and scholarly publications at the bottom, coming after international conventions, international customs, and general principles of law. There is nothing in this equation that precludes the emergence of a new norm; it is possible and probable that some judicial decisions and scholarly work will bolster a norm into the realm of a general principle of law. This is especially true if such a norm can be tied to the object and purpose of the convention in question.<sup>7</sup> As Alan Boyle has pointed out, soft law can have a very potent role in the corpus of international law as a

... [vehicle] for focusing consensus on rules and principles, and for mobilizing a consistent, general response on the part of States. Depending

---

<sup>6</sup> Higgins (1994) p.2

<sup>7</sup> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." VCLT Art.31.1

upon what is involved, treaties may be more effective than soft law instruments for this purpose...but the assumption that they are necessarily more authoritative is misplaced.<sup>8</sup>

Soft law plays a facilitating role to an evolutionary understanding and development of hard law and may be "...the first step in a process eventually leading to conclusion of a multilateral treaty."<sup>9</sup> The various documents from the human rights regimes of the UN and the CoE as well as the OSCE, and subsequent scholarly interpretation of these regimes are to be considered, in this circumstance, as strong indications of the content of State obligations as well as the direction in which State obligations may be headed.

Law-as-process takes soft law into consideration as well as the inevitable element of choice in legal decision-making.<sup>10</sup> Decision-making permeates all aspects of law from the first creation of a legal text to the final application as law and as precedent. Persons in positions of authority interact with the law in ways which reflect their understanding of the law, and their understanding is built partially on social contexts.<sup>11</sup> When choices are made, "...one must inevitably have consideration for the humanitarian, moral, and social purposes of the law."<sup>12</sup>

Law-as-process then, suggests a feasible framework for acknowledging an implicit right. If law, by its nature, cannot be distinguished from the understanding or application of it, then with shifting political concerns the discussion of a right to democracy will not necessarily require the creation of a new norm, but rather it will locate the basis of that norm in applied law and extract its content through active policy decisions. The non-hard law, the interpretations and applications of the law, can be used to alter or illuminate the meaning or content of the obligation.

---

<sup>8</sup> Boyle (2006) p.145

<sup>9</sup> Boyle (2006) p.145

<sup>10</sup> Higgins (1994) p.5

<sup>11</sup> Higgins (1994) p.5

<sup>12</sup> Higgins (1994) p.5

Finally, the law-as-process methodology eliminates the distinction between *lex lata* and *lex ferenda*.<sup>13</sup> The theory posits that the distinction between the two fades because, "...law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve."<sup>14</sup> In this way, the wilful act of arguing or of making decisions based on a composite right not clearly dictated in codified texts is in fact both law as it is and law as it should be.

### 1.2.2 Methodology for Chapters 6-8: The Demeanor and Role of Democracy

The second main part of the thesis concerns the country studies of the US and Norway. It assesses the way in which the countries themselves characterize the relationship between their democratic system and international human rights law, country-specific conceptions of human rights, and the perceived appropriate methods of implementation of human rights norms in a democratic society. This section will approach the subject from a comparative approach; the analysis will include political analysis as well as legal analysis. In an effort to investigate how each nation's self-perception is reflected in both democracy and in that country's specific approach to international law, these chapters will draw on political jurisprudence theory (also referred to as judicialization).<sup>15</sup> Political jurisprudence explores the connection between political actors and political forces, and law-based actors (lawyers, judges etc) and law-based forces; "[i]ts foundation is the sociological jurist's premise that law must be understood not as an independent organism but as an integral part of the social system."<sup>16</sup> In this analysis judges are seen not only as interpreters of the law, but secondarily as makers of the law.<sup>17</sup> These chapters will focus on the relationship between law and politics and the perceived tensions between the two in specific reference to

---

<sup>13</sup> Higgins (1994) p.10

<sup>14</sup> Higgins (1994) p.10

<sup>15</sup> Shapiro (2002)

<sup>16</sup> Shapiro (2002) p.19

<sup>17</sup> Sweet (2002) p.69: "Even when judicial and legislative functions are separated, comparative institutional advantage produces legislative-judicial interdependence. The law-maker makes rules whose reach, among others things, is *immediately* general and prospective; the judge makes rules whose reach, among other things, is *immediately* particular and retrospective. If the judge is expected to enforce the law-maker's law, and if this law is meant to be binding, coercive [triadic dispute resolution] is required. If...[triadic dispute resolution] results in rule-making, then compulsory [triadic dispute resolution] results in the authoritative reconstruction of the law-makers law. The legislator therefore shares rule-making power with the judge."

democracy. The comparative aspect of this approach will investigate the differences between the two countries in terms of political self-conceptions manifesting themselves through a connection with democracy; the similarities in the study have to do with the basic concepts of democracy rather than particular national perceptions.

### 1.3 Premise: Sovereignty and Legitimacy

Sovereignty is a tricky concept, though it is one that plays perhaps the most critical and influential role in international relations. Stephen Krasner separates sovereignty into four different forms: domestic sovereignty, interdependence sovereignty, international legal sovereignty, and Westphalian sovereignty.<sup>18</sup> The third and fourth types of sovereignty are where the tension between democratic decision-making and international human rights law is located. International legal sovereignty deals with what establishes "...the status of a political entity in the international system."<sup>19</sup> Westphalian sovereignty, or the classic understanding of sovereignty, is "...based on two principles: territoriality and the exclusion of external actors from domestic authority structures."<sup>20</sup>

It is understood that when States become parties to human rights conventions they accept the premise that they have certain responsibilities to their citizens (or to those within their jurisdiction). International norms, deriving their premise from universal values and exerting themselves within the framework of statehood, directly affect sovereignty by positing a broadened social definition of legitimate state-citizen relations. In being voluntary commitments<sup>21</sup> these obligations are invited by States and so are not a violation of, or infringement on, international legal sovereignty: "Invitation occurs when a rule voluntarily compromises the domestic autonomy of his or her own polity. Free choices are never inconsistent with international legal sovereignty."<sup>22</sup> However, such commitments do violate the Westphalian model of sovereignty to which States have seemed to be so

---

<sup>18</sup> Krasner (2000)

<sup>19</sup> Krasner (2000) p.576

<sup>20</sup> Krasner (2000) p.576

<sup>21</sup> Customary international norms and preemptive norms will not be addressed due to the scope of this thesis.

<sup>22</sup> Krasner (2000) p.576

attached.<sup>23</sup> When the concept of democracy is broadened beyond Westphalian boundaries into the international legal realm, the invitation of international standards positions the two types of sovereignty against one another in a particularly tense relationship. What emerges from this positioning is a complicated and precarious balancing of legitimacies.

The international community has begun a process leading to a requirement of democratic governance as a precondition for international legal sovereignty.<sup>24</sup> If the fundamental aspects of democracy can be found in previously codified human rights conventions, then States have already invited these standards upon themselves and have legitimately limited their own sovereignty as far as the international legal sovereignty is concerned. However, as far as Westphalian sovereignty is concerned, and especially in the case of democratic governance which positions the role of the citizen as the basis and functionary of legitimate governance, invitation of interference is not a legitimate source of influence over the requirements of a sovereign State. Democracy is a particularly thorny concept in international relations being both an implicit part of international requirements and a system of governance which bolsters conceptions of Westphalian-like sovereignty.

The ensuing chapters will attempt to construct an international human-rights-based democratic requirement, then they will explore specific country situations which are wrestling with the nature of this understanding in light of State sovereignty issues. What we eventually find is that sovereignty softens under the pressures of its discursive aspects. The international community has much to gain from slowly eroding the last standing defenders of Westphalian-like democracy, and international human rights law is a key tool in this effort. Sovereignty itself doesn't erode but rather is inching toward a broader formula guided by international legal requirements.

---

<sup>23</sup> Krasner (2000) p.577: "Regardless of the motivation or the perspicacity of rulers, invitations violate Westphalian sovereignty by subjecting internal authority structures to external constraints."

<sup>24</sup> Franck (2000); Democratic Governance and International Law (2000)



## **2 What is democracy and where can it be found?**

### **2.1 Core Concepts**

There are many political theories concerning democracy and democratic rights; whittling the definition down to a few core concepts will serve as a baseline for future arguments. Such a definition helps to clarify the discourse concerning democracy while also clearing a path for a consistent theory of the acceptable means and ends of an international democratic requirement.

A discussion of direct-democracy, though perhaps having some teleological merit, is not practically applicable to the notion of an implicit right to democracy. The contemporary understanding of democracy is broader and more various than direct-democracy and so this particular work will concentrate on a theory of democracy/democratic governance which is more practically applicable to current trends and debates without stretching the definition too far into new or radical areas. Robert A. Dahl's work fits well into this happy medium, taking its direct cue from the basis that a democratic function is meant to allow "ordinary citizens [to] exert a relatively high degree of control over [their] leaders."<sup>25</sup>

If the basic precepts of democracy can be found in human rights law, and considering to what extent they can be found, there may be an implicit human right to democracy. This chapter, "What is democracy and where can it be found?," attempts to locate the core principles of democracy within the existing human rights Conventions.<sup>26</sup>

#### **2.1.1 Democratic Premise**

Dahl's work clearly outlines the theoretical precepts of democracy. He asserts that democracy is predicated on the notion that all persons are to be considered "politically equal":<sup>27</sup> "Among adults no persons are so definitely better qualified than others to govern that they should be entrusted with complete and final authority over the government of the

---

<sup>25</sup> Dahl (2006) p.3

<sup>26</sup> only referencing the ICCPR and ECHR

<sup>27</sup> Dahl (1998) p.37

state.”<sup>28</sup> This argument is one of *intrinsic equality* <sup>29</sup> which speaks not to the status of the personal functions of individuals (as we can all see the actual inequalities that exist amongst various people) but is a moral argument that persons have intrinsically equal claims to certain goods. Dahl uses life, liberty, and the pursuit of happiness as an example of this claim; in doing this he is quite clearly invoking the idea of natural rights which translate into modern human rights.<sup>30</sup>

The political philosopher John Locke argued that governments which violate the natural God-given rights of the people lose their authority to rule, and inevitably the people will resist such oppression. Human rights are the descendent of Locke’s theory of natural rights.<sup>31</sup> The UDHR preamble duplicates Locke’s assertion (without a reference to “God”): the “...inherent dignity of the equal and inalienable rights of all members of the human family” is the “foundation of freedom, justice, and peace in the world” and it goes on to suggest that citizens may have the right to rebel against a government which does not ensure the protection of human rights.<sup>32</sup> Art.1 UDHR solidifies this further, while carefully avoiding the concept of divine endowment, in stating that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” It is from this foundation of the inherent dignity of humankind which all human rights documents are subsequently based and all human rights defenders claim as their maxim.

Thus Dahl’s premise of political equality stemming from intrinsic equality (inherent dignity), coupled with the assertion that governments that violate natural rights (human rights) are widely considered oppressive and therefore rightfully at risk of a

---

<sup>28</sup> Dahl (1998) p.75

<sup>29</sup> Dahl (1998) p.65

<sup>30</sup> This lineage is complicated and nuanced, see Freeman (2002) for more information.

<sup>31</sup> Freeman (2002) p.21-22

<sup>32</sup> UDHR Preamble §1

rebellion/overthrow, together suggest that democracies may be the only legitimate governments when seen through the lens of human rights.<sup>33</sup>

### 2.1.2 Self-Determination as a Foundation

Dahl does not specifically address the concept of self-determination, but it is the bedrock principle of the UN system of human rights and is the enumeration of the aforementioned premise that participation is the natural outgrowth of inherent/intrinsic dignity/equality. The right to self-determination is codified in Art.1 of the ICCPR.<sup>34</sup> The crux of this article is that all peoples have the right to “determine their political status and freely pursue their economic, social and cultural development.”<sup>35</sup>

Self-determination has two dimensions. The first is external self-determination (ESD) which is highly contentious in the political realm. The HRC-GC-12 does not go very far in addressing the issue and the HRC cannot accept individual complaints concerning the provision because it is deemed a collective right rather than an individual right. CERD-GR-21 however, aptly addresses the content of ESD.<sup>36</sup> ESD originally addressed situations resulting from imperialism, colonialism, the break-up of the USSR, and continues to currently address conflicts concerning the territorial integrity of States. Because ESD is clearly threatening to States in regards to territorial sovereignty, CERD-GR-21 sets moderating boundaries:

In [the] view of the Committee international law has not recognised a general right of peoples to unilaterally declare secession from a state. In this respect, the Committee...[notes] that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation

---

<sup>33</sup> Moscow Document (1991) Art.17.2: “[The Participating States of the OSCE] will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values...”

<sup>34</sup> as well as Art.1CESCR, making it “common Art.1”

<sup>35</sup> ICCPR Art.1.1

<sup>36</sup> Though CERD is mildly out of the scope of this paper, HRC-GC-12 is very weak in nature and it is common in human rights literature that CERD-GR-21 is called upon as a source of clarification.

of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.<sup>37</sup> This condition reaffirms the primacy of sovereignty in international law over the direct will of the people and reminds the beneficiary that human rights are secured within a system of law that has definitive boundaries of applicability and that these boundaries are national. However, the situations in which ESD can validly apply may be even more telling:

It is contended that a people is entitled to ESD, by way of secession, when it lives under colonial or neo-colonial domination, or when it is so severely persecuted, and its human rights so systematically abused, that ESD is necessary to remedy such abuse, and preserve its long-term viability as a people.<sup>38</sup>

This condition of ESD reaffirms the relationship of State sovereignty to the protection of human rights and the inverse relationship of human rights to the maintenance and security of State sovereignty.

The other dimension of common Art.1 is internal self-determination (ISD). This is one of the strongest and most explicit claims to democracy in the ICCPR in that it is widely interpreted as affirming democracy on a collective level.<sup>39</sup> Most notably the HRC

...identifies as the beneficiaries of self-determination the people of existing states. It equates their right of self-determination with the existence within the State of a continuing system of democratic government based on public participation. It denies that self-determination involves a right to secede.<sup>40</sup>

There has been no case-law concerning Art.1 directly. However, the HRC has found it relevant to consider Art.1 ISD as a component of possible violations of other articles; it states in *Gillot et al. v. France* that:

Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.<sup>41</sup>

---

<sup>37</sup> CERD-GR-21 §6

<sup>38</sup> Joseph (2004) p.149

<sup>39</sup> Crawford (2000) p.94

<sup>40</sup> Crawford (2000) p.95

<sup>41</sup> *Gillot et al. v. France* §13.4

This connection to Art.25 is notable in that it links the political dimension<sup>42</sup> of self-determination directly to voting rights. Self-determination is the basis for human rights in the UN system; through this, human rights documents assert the sovereignty of peoples in relation to the sovereignty of the nation-state.<sup>43</sup> When this is combined with voting rights (which will be discussed more later), the literature and concept of human rights seems to implicitly suggest that sovereignty is tied to democracy.<sup>44</sup> Europe, interestingly, does not proclaim a right to self-determination. It seems that the CoE's prerequisite of democracy<sup>45</sup> perhaps makes a right to self-determination superfluous and maybe even too abstract for the Council's purposes.

## 2.2 Core Standards of Democracy

Dahl sets out five standards for the democratic process stemming from the premise of political equality; these shall be considered the core standards of democracy.<sup>46</sup> These standards are effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion of adults. The first of these, effective participation,<sup>47</sup> is necessary to ensure that each individual has the opportunity have his/her views represented, "[t]he principle of equality requires not only that people's interests should be attended to equally by government policy, but also that their views should count equally."<sup>48</sup>

### 2.2.1 Effective Participation: Freedom of Speech

Effective participation is expressed in human rights partially through the codification of freedom of speech (to hold an opinion etc.) in Art.10 ECHR, and Art.19 ICCPR. The

---

<sup>42</sup> Hanski (2003) p.414

<sup>43</sup> Reisman (2000) p.251: "In modern international law, what counts is the sovereignty of the people and not a metaphysical abstraction called the State."

<sup>44</sup> HRC GC-25-§1+3

<sup>45</sup> ECHR Preamble §4: "*Reaffirming* their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend."

<sup>46</sup> Dahl (1998) p.38

<sup>47</sup> Though generally out of scope, it is important to mention that the *effectiveness* of participation is most developed in the area of indigenous and minority rights. Indigenous rights require, in some cases, participation in "the formulation, implementation and evaluation of plans and programmes" which affect the people directly (ILO-169 Art.7.1); see also p.19 below

<sup>48</sup> Beetham (1995) p.3

articles are similarly formulated (including the mention of duties and responsibilities), and both articles accept that the State can limit the freedom under certain conditions. The most noteworthy difference between the two articles for this discussion is the textual consideration of a “democratic society.”

#### 2.2.1.1 Freedom of Speech: ECHR

Art.10 of the ECHR contains the core of the right, while 10.2 sets the equation for acceptable limitations. It requires that restrictions be prescribed by law and are instituted in the service of a pressing social need that corresponds to the list of needs set out in the article. Encompassing these needs is the higher requirement that any limitation on the right should be “necessary in a democratic society.” This requirement runs through the acceptable limitation clauses of Arts.8-11 of the Convention. Noting that the Convention is directly descended from, and a component of, the CoE of which democracy is one of the three pillars, this requirement presupposes that the State Party is a democracy. The restriction suggests that democratic governments require specialized consideration concerning limitations on human rights and so State obligations are considered through this paradigm. It is made clear through European case law that the Court’s view of freedom of expression is constructed in direct reference to its value for a democratic society: “... [freedom of expression] constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.”<sup>49</sup> The Court’s due regard to necessity in a democratic society partially constructs the width of the margin of appreciation afforded to the State party; if a certain speech concern can be shown to contribute to “social and political debate, criticism and information” the State’s margin narrows more so than if the speech is more of an “[a]rtistic and commercial expression.”<sup>50</sup>

---

<sup>49</sup> *Handyside v. UK* §48)

<sup>50</sup> *Ovey* (2006) p.320

### 2.2.1.2 Freedom of Speech: ICCPR

Art.19 of the ICCPR sets out similar acceptable reasons for limiting the freedom of speech as well as also requiring that such limitations be prescribed by law. There is a requirement that all limitations prove “necessary” for the State party, but it does not presuppose a democratic society. Rather, the necessity of the restriction is linked to the acceptable aims of the restriction listed in the article as well as to the proportionality principle.<sup>51</sup>

### 2.2.1.3 Freedom of Speech: Summing up

Despite the differing textual reference to democracy, the case law generally shows that there is not much difference between the proportionality as measured by the HRC concerning the legitimate aims and the specific consideration of a democratic society in the ECHR. There is little difference in the understanding of the right to freedom of expression and in the understanding of its application. Freedom of expression can then be said to be supported in both Conventions without being overly affected by the express reference to democratic governance.

## 2.2.2 Effective Participation: Assembly and Association

The second aspect of effective participation from a human rights perspective is freedom of association. In a large democracy it is necessary and prudent to form organizations and political parties that solidify and promote the viewpoint of individuals. These organizations serve as an intermediary between the individuals and the State. Both the ICCPR and the ECHR have rights that protect assembly and association.<sup>52</sup>

### 2.2.2.1 Freedom of Assembly and Association: ECHR

Art.11 ECHR contains the same condition of “necessary in a democratic society” that has been discussed above. In the European case law, it seems that the Court has defacto

---

<sup>51</sup> HRC-GC-10; Siracusa Principles Art.11; Nowak (2003) p.61; Nowak (2005) p.426: “The requirement of necessity implies that the restriction must be *proportional* in severity and intensity to the purpose being sought and may not become the rule...the relevant criterion for evaluating whether interference is necessary is not a common, democratic minimum standard but rather solely whether it was proportional in the given case.”

<sup>52</sup> Art.21 & 22 ICCPR; Art.11 ECHR

divided applications concerning Art.11 into two categories.<sup>53</sup> The first category concerns “...‘political’ or ‘democratic’ rights—such as the freedom to take part in a demonstration or to join a political party—which are closely linked to freedom of expression, [and] draws heavily on the principles developed by the Court under Article 10.”<sup>54</sup> The second category mainly deals with issues of trade-unions, where the Court’s deliberations seem more muddled and less decisive.<sup>55</sup> Thus the aspect of Art.11 which relates to expression, a standard principle of democracy, is stronger (in Court practice) than other aspects of Art.11.

#### 2.2.2.2 Freedom of Assembly and Association: ICCPR

The ICCPR provisions to protect these rights contain two of the only three references to a “democratic society.” The third reference to a “democratic society” is in Art.14 concerning a fair trial. It is curious that this specific limitation enters the clause in the assembly/association Articles and not other places. It is difficult to flush out the value of this consideration because the prevailing literature doesn’t tend to give it much notice and HRC case law on these Articles has been minimal. It is of course true that the consideration implies a more specified evaluation of proportionality, though what that exactly entails is unclear. There is not yet a General Comment on either of these Articles, so the only guidance available is the Siracusa Principles which state that the consideration of a democratic society “...shall be interpreted as imposing a further restriction on the limitation clauses it qualifies” and that this further restriction is predicated on the fact that a limitation must not “...impair the democratic functioning of the society.”<sup>56</sup> The next subpart of the consideration of the limitation in the Siracusa Principles seems intended to acknowledge the opaqueness of these previous two, it states: “While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may

---

<sup>53</sup> Ovey (2006) p.344

<sup>54</sup> Ovey (2006) p.344

<sup>55</sup> Ovey (2006) p.344

<sup>56</sup> Siracusa Principles: I.B.ii.



be viewed as meeting this definition.” This final definition is quite broad and has interesting implications if it is to be taken seriously.

### 2.2.3 Voting Equality

Dahl’s next standard for a democratic process is that of voting equality. This is the “equal and effective opportunity to vote, and all votes must be counted as equal.”<sup>57</sup> This requirement is generally considered the political crux of democracy. A vote is the political expression of the will of the electorate.

#### 2.2.3.1 Voting Rights: ECHR

Voting rights in the CoE are in Art.3 of Protocol 1 (P1-3).<sup>58</sup> The main component of P1-3 (for this discussion) is the aim of the right, which is to “ensure the free expression of the opinion of the people in the choice of the legislature.”<sup>59</sup>

Article 3 of the First Protocol underpins the whole structure of the Convention in requiring that the laws should be made by a legislature responsible to the people. Free elections are thus a condition of the ‘effective political democracy’ referred to in the Preamble, and of the concept of a democratic society which runs through the Convention.<sup>60</sup>

P1-3 overtly references the concept of political expression through voting rights. It does not, however, overtly require a specific political structure. What constitutes a “legislature” is decided by the Court on a case-by-case basis and has been interpreted to be broader than strictly national parliaments.<sup>61</sup>

Despite the fact that there are no express limitations listed within the text of the right, the Court repeatedly notes that there are implied limitations. These implied limitations have taken similar form to the structure of limitations on Arts.8-11 in that they require that the essence of the right itself not be impinged upon, that the aim pursued must be considered

---

<sup>57</sup> Dahl’s (1998) p.37

<sup>58</sup> The ECHR and its Protocols (which are in force) should be taken as a whole.

<sup>59</sup> ECHR P1-3

<sup>60</sup> Ovey (2006) p.388

<sup>61</sup> Ovey (2006) p.391

legitimate, and the means considered proportional.<sup>62</sup> The primary consideration of the aims then shifts from “necessary in a democratic society” to the requirement that the “free expression of the will of the people” not be hindered. Thus, “[i]f a person complains that he or she is disqualified from voting, the Court’s task is to consider whether such disqualification affects the free expression of the opinion of the people under Article 3.”<sup>63</sup> Here then there is a trade off between necessity in a democratic society and the free choice of the legislature, but the purpose of the restriction is aimed at the same result, suggesting that these two concepts are interchangeable.

### 2.2.3.2 Voting Rights: ICCPR

Art.25 of the ICCPR goes much further in securing political rights than does P1-3. It sets out the right to (a) take part in public affairs directly or through representatives, (b) to vote in elections which, among other things, guarantees the free expression of the will of the electors, and (c) have equal access to public services.<sup>64</sup> Still, Art.25, like P1-3 ECHR, does not require a specific form of government, but rather requires that any form chosen be in conformity with Art.25 and, specifically, with the free expression of the will of the electors.<sup>65</sup>

GC-25 on Art.25, unlike the article itself, refers directly to democracy and states the importance of Art.25 in this domain; “Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”<sup>66</sup> It strengthens this tie to democracy through the elaboration of several other rights and requirements that are interlinked with Art.25: “Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is

---

<sup>62</sup> *Mathieu-Mohin and Clerfayt v. Belgium* §52

<sup>63</sup> Ovey (2006) p.392 referring to *X v. Belgium*

<sup>64</sup> ICCPR Art.25

<sup>65</sup> HRC-GC-25-§21

<sup>66</sup> HRC-GC-25-§1

supported by ensuring freedom of expression, assembly and association.”<sup>67</sup> This concept of participation is further strengthened in connection with Art.27 on minority rights, the HRC has concluded (in GC-23) that there is a requirement that a State allow for “*effective participation* of members of minority communities in decisions which affect them.”<sup>68</sup>

Without explicitly requiring democracy, the HRC has indirectly linked democracy to the requirement that State Parties ensure to those within its jurisdiction<sup>69</sup> the rights within the Covenant. This is done most explicitly in §1 of GC-25 where the structure of the paragraph hints at a substantive connection:

Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.<sup>70</sup> [end paragraph]

The ICCPR does not explicitly require a democracy as the ECHR does, but it seems to make up for this lacuna in its well flushed out Art.25 which is broader and more direct than its European counterpart.

#### 2.2.4 Enlightened Understanding

The third standard of democracy is a requirement that the electorate have an enlightened understanding. This entails that citizens have “equal and effective opportunities for learning about the relevant alternative political policies and their likely consequences.”<sup>71</sup>

This requirement is the extension of the concept of *political* equality. Noting that people are intrinsically equal in their claims to rights is not enough to ensure political equality.

---

<sup>67</sup> HRC-GC-25-§8; Steiner (2000) p.892: “In view of their essential role in most political activities, the expressive rights to free speech, press, assembly and association must in some way inform any theory of participation. Their prominence in the International Covenant reminds us that Article 25 should not be approached as an isolated provision, detached from the larger structure of rights in the Covenant. That larger structure here suggests that the ‘take part’ and ‘elections’ clauses assume some degree of public political debate and of citizens’ participation in political groups expressing their beliefs or interests.”

<sup>68</sup> (emphasis mine); HRC-GC-23-§7; Joseph (2004) p.658

<sup>69</sup> allowing some digression in voting rights and political activities for non-citizens

<sup>70</sup> HRC-GC-25-§1

<sup>71</sup> Dahl (1998) p.37

The legitimacy of the expression of the opinion of the people depends on access to information.

#### 2.2.4.1 Enlightened Understanding: ECHR

The concept of enlightened understanding is not manifested as explicitly in the ECHR as have been the previous standards for democracy. However, noting that the Convention is to be read as a whole, a combination of rights may cover this standard. Returning to Art.10.1 shows that not only is there a right to hold opinions, but also within freedom of expression is the right to “...receive and impart information and ideas without interference by public authority and regardless of frontiers.” Returning also to the text of Art.11 it is clear that the right to associate and assemble is predicated on the notion of protecting one’s interests.<sup>72</sup>

Further, there is P1-2, the right to education. Though this right does not specifically address the content of education, there is a consideration for maintaining the pluralism<sup>73</sup> necessary to a democratic society through the consideration of the rights of parents to “...ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>74</sup> This requirement and its consideration for and promotion of pluralism helps contribute to an enlightened electorate. Further,

The Court has recognized that the right to education has links with the rights protected by Articles 8-10 of the Convention and needs to be interpreted consistently with the general spirit of the Convention as an instrument designed to maintain and promote the ideas and values of a democratic society.<sup>75</sup>

#### 2.2.4.2 Enlightened Understanding: The ICCPR

Enlightened understanding also does not appear as a codified right in the ICCPR but, as with the ECHR, there is a composite of rights that seem to cover the standard. Firstly,

---

<sup>72</sup> Art.11.1 ECHR: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”

<sup>73</sup> *Handyside v. UK* §49: “Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”

<sup>74</sup> ECHR P1-2

<sup>75</sup> Ovey (2006) p.377 referencing *Kjeldsen, Busk Madsen and Pedersen v. Denmark* §54

there is there is freedom of expression in which, “[e]veryone shall have the right to hold opinions without interference.”<sup>76</sup> In addition to this, Art.20.2 prohibits any advocacy which “...constitutes incitement to discrimination, hostility or violence...” and so protects against damaging or dangerous manipulation of information.<sup>77</sup> Then once again Art.21 (assembly) and 22 (association) can both contribute to an enlightened understanding through the formulation and transmission of ideas and knowledge.

Unlike the ECHR there is no provision in the ICCPR for education. There is a provision in CESCR (Art.13). The right to education also exists in the CRC (Art.7) which is widely considered customary law due to its extensive ratification. So a right to education is aptly covered by other Conventions. However, it is notable that here education is considered a social right rather than a civil or political right.

#### 2.2.4.3 Enlightened Understanding: Summing up

Clearly neither the ECHR nor the ICCPR fully cover a requirement of an enlightened electorate. Though there are provisions within the Conventions that do somewhat address the concept, it is not specifically provided for, and the ICCPR notably lacks a provision on education. However, freedom of expression does healthily cover freedom of the press and, as stated earlier, is particularly effective concerning press that contributes to political debate. Non-discrimination in Art.14 and P-12 of the ECHR, and Art.26 of the ICCPR may help to ensure an equal opportunity<sup>78</sup> to enlightened understanding. Non-discrimination is a fundamental theme of democratic governance in that it equalizes the claims to goods; non-discrimination will be addressed more directly in “2.2.6 Inclusion of Adults.”

---

<sup>76</sup> Art.19.1 ICCPR

<sup>77</sup> The U.S. has submitted a reservation on Art.20 arguing that it infringes freedom of speech, see ICCPR U.S. Res.

<sup>78</sup> Dahl (1998) p.37

### 2.2.5 Control of the Agenda

The fourth standard for democracy is control of the agenda. The populace should decide what matters are to be placed on the political agenda, and how they are to be placed there.<sup>79</sup> Control of the agenda is a natural outgrowth of a properly formatted democracy, meaning that it is responsive to the public. This standard is covered by the right to vote and the free expression of the will of the people.

#### 2.2.5.1 Control of the Agenda: ECHR and ICCPR

Both Conventions are structured so as to require the State Party to be responsive to (respect, protect), and engaged with (fulfil), the populace. The right to vote, P1-3 ECHR and Art.25 ICCPR, assumes that the legislature is both an expression of the will of the people, as well as responsive to the will of the people (due to the requirement of frequent elections).<sup>80</sup> Secondly, freedom of expression has a individual right element (to hold an opinion) and an element which is of a more collective nature (see Art.19.2 ICCPR).<sup>81</sup> The formula of State obligations combined with these rights establishes a model in which the people have enough access to exert control over the political agenda.

### 2.2.6 Inclusion of Adults

The final standard of democracy is the inclusion of adults in which Dahl simply presents that all adults should full citizen's rights.<sup>82</sup> This is a logical outgrowth of the moral principle of intrinsic equality<sup>83</sup> which, in human rights terms, is synonymous with inherent dignity.

#### 2.2.6.1 Inclusion of Adults: ECHR

The ECHR covers this standard through several laws. The main thrust lies in non-discrimination Articles and in Art.1 which states: "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section 1 of

---

<sup>79</sup> Dahl (1998) p.38

<sup>80</sup> For more on the responsiveness of the legislature see GC-25-§7+§8

<sup>81</sup> Nowak (2005) p.438-441

<sup>82</sup> Dahl (1998) p.38, p.78

<sup>83</sup> Dahl (1998) p.65

this Convention.”<sup>84</sup> Though Art.1 is not particularly a non-discrimination provision, it deals with the equality principle and therefore sets the standard for what is to be judged as discrimination.<sup>85</sup> Discrimination is dealt with in Art.14 as well as in P12. Art.14 is peculiar in that it limits its scope of protection to rights guaranteed within the Convention. P12 addresses this peculiarity by expanding the scope to “any right set forth by law.”<sup>86</sup> P12 came into force in 2005 and is formulated in reference to Art.14 and is constructed narrowly.<sup>87</sup> There has yet to be any case-law on P12 so it is difficult to judge its scope and influence. Regardless, it is clear that Art.14 and P12 support and protect the human rights within the ECHR which contribute to an implicit requirement of democratic governance and thus the standard of inclusion of adults, for our purposes, is well covered.

#### 2.2.6.2 Inclusion of Adults: ICCPR

Much like Art.1 ECHR, Art.2.1 of the ICCPR asserts that the State Party must guarantee the rights in the Convention to all within its jurisdiction “...without distinction of any kind” and thus establishes equality in regards to claims concerning the protection of the Covenant. The ICCPR also contains a particular provision for the equality of men and women (Art.3). The ICCPR’s general non-discrimination clause, Art.26, prohibits discrimination in reference to the provisions of the Covenant as well as in the national laws of State Parties;<sup>88</sup> its effect is equal to Art.14 ECHR and P12 combined. In relation to the standard of inclusion of adults, Art.25 also goes further than the ECHR in guaranteeing (in Art.25(a)) that citizens have the right “[t]o take part in the conduct of public affairs, directly or through freely chosen representatives.” The ICCPR addresses the inclusion of adults implicitly through its applicability to all within the State Party’s jurisdiction, and explicitly through non-discrimination and as a part of voting rights.

---

<sup>84</sup> emphasis mine

<sup>85</sup> For the formula concerning when treatment becomes discriminatory based on the equality principle, see P12 Explanatory Report §15.

<sup>86</sup> ECHR P-12 Art.1.1

<sup>87</sup> For more information on P12 see the Explanatory Report (P-12 ER); P-12 ER §24 of the Commentary on the Provisions

<sup>88</sup> HRC-GC-18-§12: “In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”

### 2.3 Conclusion of Section

It is not overly ambitious to argue that the core standards of democracy, as delineated by Robert A. Dahl, find firm grounding in the civil and political rights of the ECHR and the ICCPR. Though the ECHR has the advantage of a clearly established commitment to democracy, there seems to be little effective difference between the protections the Conventions provide. Admittedly, both Conventions are less thorough in their composite protection of the third standard (enlightened understanding) and the fourth standard (control of the agenda). However, both of these standards are as much a result of a political system as they are standards of it; they may be effects of the other standards.

Through GCs, ECtHR decisions, human rights literature, and other mediums of the human rights regime, an implicit right to democracy has begun to broaden its base of support in the foundation of the Conventions, the codified rights within the Conventions, and the enumerated requirements of those rights. This type of authoritative decision-making is what structures law, especially in the context of this galvanizing democratization trend. Understanding democracy in this authoritative sense is critical to its potency and validity as a universal requirement:

The value of enforcing the entitlement as a legal rule becomes subject to the outcome of discussions involving highly complex issues of local culture, political economy and resource allocation. If democracy is thereby understood as a contingent value, then a legal rule embodying democratic principles will suffer from perpetual contingency as well.<sup>89</sup>

The ECHR has a firm and explicit grounding in, and consideration of, a democratic society. The ECtHR employs a consideration of a “margin of appreciation” when evaluating State obligations concerning the ensured rights. This margin is a country-specific and situation-specific scope of leeway afforded to a State Party for the general purpose of allowing for consideration of particular circumstances relating to the experiences and challenges of States within Europe. Because the requirement of democracy is such a strongly grounded value in the European system, the margin of appreciation would most likely widen if a

---

<sup>89</sup> Fox (2000a) p.1



State's actions are intended to preserve or secure democracy and would narrow if a State's actions were not conceived to be in line with democratic values. In this way, the consideration of democracy in the European system becomes dynamic and molds itself to progressive common understandings of its meaning and scope.

The HRC does not acknowledge democracy as a grounding principle of the ICCPR<sup>90</sup> and, despite its wider and more varied membership, there is no consideration for a margin of appreciation. However, as alluded to earlier, the differences in the delineated standards of protection (versus the ECHR) of the various rights are seldom glaring or gross. The rights themselves are similarly formatted and their protections are consistent enough to argue that the consideration of "necessary in a democratic society" as an explicit requirement isn't of pivotal importance to the protection of universal human rights and so is not pivotal in the protection of the building blocks of democracy. From this evaluation it seems that the consideration that may be necessary to preserve and promote democracy already exists within the Covenant—it is implicit.

Human rights, as both a conception and as a field of law, seem to be growing increasingly persuasive in the field of international politics and relations. It is therefore significant to note the political slant of the universal requirements of dignity. An implicit right to democracy is grounded in inherent dignity and flows naturally from the universal requirements of such dignity. Human rights regime requirements are meant to inform international legal sovereignty. Uncovering an implicit right through these avenues (taking a law-as-process approach) posits democracy as a contingency for universal human dignity and such a requirement should also inform the standards of international legal sovereignty.

---

<sup>90</sup> It is notable that the UDHR refers to democracy within its limitation clause in Art.29.2 though this has not passed on to the Covenants due to Cold War proclivities.

### 3 Actual Democracy

The above section focused on the five standards of democratic processes. In his work “On Democracy,” Dahl goes on to postulate what types of institutions would be necessary in a governmental democracy. Admittedly this is a difficult task in that the standards being drawn upon are broad and no democracy is perfect or near perfect enough to serve as a direct template.<sup>91</sup> He lists six *minimal requirements* for a large scale democracy: elected officials; free, fair, and frequent elections; freedom of expression; alternative sources of information; associational autonomy; and inclusive citizenship. Dahl generally refers to large scale governmental democracy as a “polyarchy.”<sup>92</sup>

The *standards* of democracy are universal in the sense that they apply to the core of what democracy means. They are the standards for a democratic group of five people as they are the standards for a democratic international organization. These *minimal requirements* for a polyarchy however, are the practical conditions for a democratic group the size in which “...the number of citizens becomes too numerous or too widely dispersed geographically...for them to participate conveniently in making laws by assembling in one place”<sup>93</sup> as is the case with the government of a country.

#### 3.1 Elected Officials

Effective participation and control of the agenda as standards for democracy change from direct participation to indirect participation in a polyarchy. A polyarchy is too wide and dispersed for direct participation. “The only feasible solution, though it is highly imperfect, is for citizens to elect their top officials and hold them more or less accountable through elections by dismissing them, so to speak, in subsequent elections.”<sup>94</sup>

---

<sup>91</sup> Dahl (1998) p.42, p.84

<sup>92</sup> Dahl (1998) p.90

<sup>93</sup> Dahl (1998) p.93

<sup>94</sup> Dahl(1998) p.93

### 3.1.1 Elected Officials: ECHR and ICCPR

The requirement of elected officials is covered peripherally by P1-3 in the ECHR. The Article implies that a legislature exists and ensures the free expression of the people in its choice:

Article 3 of the First Protocol ‘presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society’. It goes further than requiring free elections; it requires that the exercise of political power be subject to a freely elected legislature.<sup>95</sup>

The ICCPR also secures these conditions. GC-25 §7 asserts strongly that,

Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power.

The Comment then goes on to address the concept of control of the agenda by stating,

Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.<sup>96</sup>

### 3.2 Free, Fair, and Frequent Elections

Free, fair and frequent elections require that citizens “can go to the polls without fear of reprisal,” all votes are counted equally, and elections take place on a relatively frequent basis (somewhere between 1-5 years).<sup>97</sup> The freedom from fear is covered in both Conventions in the right to life, the right to movement, and the rights protecting liberty and security.<sup>98</sup>

#### 3.2.1 Free, Fair, and Frequent Elections: ECHR

As stated earlier, P1-3 does not guarantee every person a right to vote; rather it secures the free expression of the will of the people in the choice of the legislature. This may be an

---

<sup>95</sup> Ovey (2006) p.388 referencing *The Greek Case*

<sup>96</sup> HRC-GC-25-§8

<sup>97</sup> Dahl’s (1998) p.95

<sup>98</sup> ECHR: Art.2, Art.5, P4-2; ICCPR: Art.6, Art.9, Art.12

important difference in relation to the ICCPR's Art.25. The Court notes that there are implied limitations<sup>99</sup> to the right to vote and to stand for election (that go beyond the general limitations requirement in Art.17) but it seems that this condition goes no further than the restrictions available in Arts.8-11. However, in the case of *Mathieu-Mohin and Clerfayt v. Belgium* the restrictions placed on elections concerning language areas seemed to challenge the straightforwardness of the notion of free, fair, and frequent elections and result in the Court supporting a system in which some citizens' votes have less potency than others.<sup>100</sup>

Another restriction is revealed in *Refah Partisi (The Welfare Party) v. Turkey*. Refah Partisi was an increasingly popular political party in Turkey which aimed at implementing a system of justiciable Sharia law. Though highly debated by scholars, the seeming aims of Refah Partisi were in conflict with what the Turkish government viewed as the fundamental elements of democracy. The ECtHR agreed (both at Chamber level and at Grand Chamber level) with the Turkish government's contention that Sharia is incompatible with the fundamental principles of democracy as set forth by the Convention.<sup>101</sup> The Court ruled that

...a political party whose leaders incite violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.<sup>102</sup>

---

<sup>99</sup> *Santoro v. Italy* §54

<sup>100</sup> 54. ...It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes".

For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the "free expression of the opinion of the people in the choice of the legislature".

<sup>101</sup> *Refah Partisi v. Turkey* §123-124

<sup>102</sup> §98

The State dissolved the political party to prevent a, supposedly, anti-democratic party from democratically attaining power. The Court ruled that such dissolution of a political party was legitimate, setting the standard that a State Party can validly limit free and fair elections in order to protect democracy from itself. The purity of a representative system then is mitigated by the consideration of democracy in the ECHR generally and Art.17 specifically.<sup>103</sup> This intersection of human rights protection and democratic practices shows the mutual interrelatedness of these considerations ingrained into the European Convention.

### 3.2.2 Free, Fair, and Frequent Elections: ICCPR

The free, fair, and frequent elections condition is clearly laid out in GC-25 §19, “In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights.” The ICCPR, as with the ECHR, does allow States to impose restrictions on the right to vote. This can be seen in *Gillot et al v. France* in which the HRC recognized that residency restrictions on voting in particular referenda (when taken in light of self-determination) were not a violation of Art.25. It has not, however, gone so far as the ECtHR in allowing the dissolution of a political party.

### 3.3 Freedom of Expression

Dahl explains that there must be freedom of expression for actual democracy and democratic institutions to be true to the standards of democracy. This includes not only the right to express one’s self, but also the right to “hear what others have to say.”<sup>104</sup> He links freedom of expression to the standards of effective participation, enlightened understanding, and influence of the agenda.<sup>105</sup> Freedom of expression, which has been

---

<sup>103</sup> ECHR Art.17: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

<sup>104</sup> Dahl’s (1998) p.97

<sup>105</sup> Dahl (1998) p.96-7

explored in-depth earlier, is covered in both Conventions and thus required to be respected, protected, and fulfilled by every State Party.<sup>106</sup>

### 3.4 Alternative Sources of Information

The fourth minimal requirement for a large scale democracy is that the citizenry must have access to alternative and independent sources of information to be able to participate in a truly enlightened manner.<sup>107</sup> The HRC flushes-out this requirement a bit further by noting that:

In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21, and 22 of the Covenant, and including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.<sup>108</sup>

The requirements of Art.25, as noted earlier, go further than those requirements for P1-3 but P1-3 is to be considered an integrated part of the Convention<sup>109</sup> and thus should be viewed in a holistic sense with other rights and with the notion that the ECHR is a living document.<sup>110</sup> This holistic approach can be seen in the *Handyside* case where Art.10 is seen as a particular aspect of democracy:

Subject to paragraph 2 of Article 10 (art. 10-2), [freedom of expression] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such

---

<sup>106</sup> This statement oversimplifies in that that reservations and derogations can be made on freedom of expression.

<sup>107</sup> Dahl (1998) p.97-8

<sup>108</sup> HRC-GC-25-§25

<sup>109</sup> ECHR P1-5

<sup>110</sup> see *inter alia* *Tyrer v. the UK* §31: “The convention is a living instrument which...must be interpreted in the light of present day conditions.”

are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'<sup>111</sup> Though *Handyside* is the oft-quoted case concerning freedom of expression, its ruling must be viewed in light of *Refah Partisi*. The limitations on expression for the preservation of democracy in terms of *Refah Partisi* seem to strike at the core of the consideration of pluralism in *Handyside*. So, once again, human rights are curtailed when they seem to stretch into a realm deemed dangerous to the promotion and protection of democracy.

### 3.5 Associational Autonomy

Associational autonomy, or the right to form relatively independent associations or organizations, including independent political parties and interest groups,<sup>112</sup> are necessary for a large scale democracy to ensure that elections can be adequately challenged and legislators can be influenced by the citizenry.<sup>113</sup> They also serve as a form of civic education and enlightenment.<sup>114</sup>

This requirement is covered by the rights to freedom of association and assembly noted earlier in ECHR Art.11 and ICCPR Art.21 and 22. In consideration of space, the discussion concerning these rights will not be repeated here.

### 3.6 Inclusive citizenship

The last minimal requirement for a polyarchal government is inclusive citizenship. This, of course, entails universal suffrage, that all people are equal before the law and under the law, and non-discrimination. All of these rights are codified and aptly protected in both the ECHR and the ICCPR.<sup>115</sup>

---

<sup>111</sup> *Handyside v. UK* §49

<sup>112</sup> Dahl (1998) p.86

<sup>113</sup> Dahl (1998) p.98

<sup>114</sup> Dahl (1998) p.98

<sup>115</sup> ECHR: P1-3, Art.5, Art.6, Art.14, P12; ICCPR: Art.25, Art.14, Art.3, Art.26

### 3.7 Conclusion of Section

It is clear that the five standards for democracy and the six minimal institutional requirements for democracy are not a complete blueprint for a successful government nor are they limits to what democracy can achieve. What they are however, are logical minimal elements of a cohesive definition of democracy in a theoretical sense and in a practical political sense. Though not perfectly aligned, these elements are supported and well defined by codified human rights.

The two human rights systems addressed here, though differing (often slightly) in their textual formulation, are mostly similar in their content as well as their accepted limitations and considerations. Democracy and human rights seem to sometimes operate as checks and balances in relation to one another, and in that sense, define each other's boundaries. State Parties to the Conventions limit their internal sovereignty in line with human rights obligations (at least in theory) and democracy is the source of that sovereignty which is to be limited. This connection shows the interdependent and indissoluble<sup>116</sup> link between human rights and democracy. It is then relatively safe to say that democracy and human rights form a symbiotic coalition that serves well to clarify the definition and requirements of democracy and which reinforce the scope and requirements of human rights.

---

<sup>116</sup> The term “indissoluble” is taken from various UN documents, for example UNCHR Resolution 2000/47 and GA Resolution 55/96 (2000).



## 4 The Added Value of Institutional Work

### 4.1 Introduction

The human rights regime, beyond reference to specific rights within the ECHR and the ICCPR, goes further in the promotion and elucidation of democracy. The international human rights community presents democratic trends which are built on human rights and are formulated through the influence of the evolving standards and situations of the State Parties. Institutional work goes beyond the core standards and requirements of democratic governance to expand democracy's role in the international legal realm—it does this through the particular avenue of human rights.

### 4.2 The Relevant Institutions

Democracy has been a pillar of the European system of human rights since its inception,<sup>117</sup> and these links are elaborated more strongly and more numerous as time progresses.<sup>118</sup> The CoE was created in 1949 with the aims to promote human rights, democracy, and the rule of law; it is a strong and stable system which presents unequivocal support for democracy and democratization.<sup>119</sup> Its documents establish a strong link between democracy and human rights and premise that the two are symbiotic.<sup>120</sup>

With the waning of the Cold War<sup>121</sup> and the democratization of Latin America<sup>122</sup> in the end of the 1980s the United Nations regime joined the CoE's explicit promotion of democracy.<sup>123</sup> Though there is no reference to a specific "right" to democracy in the ICCPR, nor does the word "democracy" appear anywhere in the UN Charter, it has been

---

<sup>117</sup> Pratchett (2004) especially Chapter 3

<sup>118</sup> See the Forum on the Future of Democracy, the Warsaw Declaration, etc.

<sup>119</sup> CoE Statute

<sup>120</sup> Forum for the Future of Democracy: Conclusions by the General Rapporteurs §6

<sup>121</sup> E/CN.4/Sub.2/2001/32 §24: "The [UDHR] and, subsequently, the Covenants, could not refer directly to democracy as a right, since any attempt to do so was thwarted by the ideological confrontation arising from the cold war. Those instruments opted instead to separate out the basic elements of the rule of law and democracy and to deal with them as separate rights, particularly the right to free and fair elections, citizens' access to the public service and the conduct of government in a non-discriminatory basis."

<sup>122</sup> Human Rights in Perspective (1992) p.xi-xiii

<sup>123</sup> OHCHR *Democracy*; *inter alia* UNCHR Resolutions 2003/36, 2005/29, 2005/32; OHCHR *Democracy-Progress So Far*; Vienna Declaration 1993 §8

argued that democracy is one of the founding principles and primary commitments of the UN.<sup>124</sup> Democracy promotion fits nicely into the three main purposes of the UN as set out in the preamble of the Charter: preventing the scourge of war, protecting and promoting human rights, and development in terms of social progress and human rights.<sup>125</sup> There has been a steady stream of Resolutions from the UNCHR (now replaced by the Human Rights Council), various seminars, and GA resolutions concerning the promotion of democracy in the UN system and the interrelatedness of democracy and human rights. The UDHR, widely considered an authoritative interpretation of the UN Charter's references to human rights, lays out electoral rights in Art.21 and requires a social order in which human rights can be fully realized (Art.28). Despite the UN Charter being clearly and intentionally without reference to democracy and the fact that the UN membership is not composed of universally democratic states, the discourse on democracy has quickly acquired strength since the end of the Cold War.<sup>126</sup>

The OSCE (originally the CSCE) was originally “[c]oncieved as a compromise instrument to bridge the ideological chasm that divided East from West in the 1970’s...”<sup>127</sup> With the end of the Cold War, the OSCE’s role expanded to address issues of rule of law, of democracy, and of minority rights etc. The OSCE commitments are not legally binding but rather are political commitments which have significant strength. There are three main OSCE documents which strongly address participatory rights: the Copenhagen Document, the Charter of Paris, and the Moscow Document. These documents establish clear and influential principles concerning democratic government and its links with human rights.

... [T]he OSCE has pioneered a holistic approach to human rights, which proceeds on the assumption that individual rights are best protected in states which adhere to the rule of law and democratic values and are so constituted to permit these concepts to flourish.<sup>128</sup>

---

<sup>124</sup> OHCHR *Democracy* referencing former Secretary General Boutros-Boutros Ghali

<sup>125</sup> UNCharter Preamble; The UN role in promoting democracy: between ideals and reality (2004) p.5-10

<sup>126</sup> Vienna Declaration 1993 §8

<sup>127</sup> Buergenthal (2002) p.205

<sup>128</sup> Buergenthal (2002) p.213

#### 4.2.1 Rule of Law, Democratic Security, Sustainable Development, Racism, and Poverty Reduction

The principle of the rule of law, fidelity to written law and the principle that no one is above the law, overlaps and interconnects with that of democracy. The rule of law is necessarily a precondition for a human-rights-based definition of democracy because the standards of democracy are predicated on the vertical legal relationship between jurisdictional subject and State and are formulated in international law. It is consistently noted in UNCHR Resolutions, the work of the OSCE,<sup>129</sup> and CoE documents that democracy and the rule of law are interdependent and are “both necessary to create an environment in which human rights can be realized.”<sup>130</sup> The human rights regime has then strengthened the grounding of democracy through its work on the promotion of rule of law principles.

The Warsaw Declaration of 2005 (CoE) makes reference to the concept of “democratic security” of the European region, which it hopes to preserve and strengthen. This concept, bolstered by the work of the OSCE,<sup>131</sup> argues that effective democracy is essential for “preventing conflicts, promoting stability, facilitating economic and social progress, and hence for creating sustainable communities where people want to live and work, now and in the future.”<sup>132</sup> This consideration shows that democracy is seen as a strong supportive base for national aspirations.

---

<sup>129</sup> Copenhagen Document (1990) Art.2: “They are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.”; “Human Rights, Democracy and Rule of Law” Charter of Paris (1990)

<sup>130</sup> Conclusions and Recommendations of the Expert Seminar on Democracy and the Rule of Law Art.1

<sup>131</sup> “Friendly Relations among Participating States” Charter of Paris (1990): “The participating states express their conviction that full respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe.” Copenhagen Document (1990) preamble; “Our relations will rest on our common adherence to democratic values and to human rights and fundamental freedoms. We are convinced that in order to strengthen peace and security among our States, the advancement of democracy, and respect for and effective exercise of human rights, are indispensable...”

<sup>132</sup> Warsaw Declaration (Art.3)

Democracy and development<sup>133</sup> are considered to be interdependent and mutually reinforcing.<sup>134</sup> The elements of popular participation, non-discrimination, and the promotion of a “culture of democracy”<sup>135</sup> or similarly the promotion of economic, social, and cultural rights<sup>136</sup> contribute to development policies that are effective and rights-based. More recently the non-discriminatory effective participation aspect of democracy has been linked to both a reduction in racism and poverty rates.<sup>137</sup> All of these considerations broaden democratic considerations and thus further integrate it into the international legal realm and ground it firmly in the evolving concerns of the human rights field.

#### 4.2.2 The Formulation of Democracy

Beginning in 2001 the UNCHR Resolutions started making reference to the rich diversity of democracies across the globe. With subsequent resolutions two concepts seem to have emerged from this recognition of diverse democracies. The first is that,

...each society and every context has its own indigenous and relevant democratic institutional traditions, and that while no single institution can claim democratic perfection, the combination of domestic democratic structures with universal democratic norms is a formidable tool in strengthening both the roots and the reach of democracy and in advancing a universal understanding of democracy.<sup>138</sup>

This concept lays the foundation for a limited definition of the requirements of democracy in a way that allows for States to formulate their own national systems while paying heed to State sovereignty, evolving conceptions of democratic requirements, and facilitating transitions from non-democratic systems into democracies. It also notes that the core of democracy is universal.

The second concept of diversity of democracies appears while the resolutions begin to take explicit note of “major changes taking place on the international scene”<sup>139</sup> and states that “...while all democracies share common features, there is no one model of democracy;

---

<sup>133</sup> later “sustainable development”: UNCHR Resolution 2000/47 Art.(xvi )(g)

<sup>134</sup> for example UNCHR Resolution 2001/36 preamble §5

<sup>135</sup> UNCHR Resolution 1999/57 Art.4

<sup>136</sup> UNCHR Resolution 2005/32 Art.5

<sup>137</sup> *inter alia* UNCHR Resolution 2002/34 Preamble §12; UNCHR Resolution 2005/29 Preamble §18+19

<sup>138</sup> UNCHR Resolution 2003/35 Preamble §20; UNCHR Resolution 2005/29 Preamble §27

<sup>139</sup> *inter alia* UNCHR Resolution 2003/35 Preamble §8; UNCHR Resolution 2005/29 Preamble §9

therefore *we must not seek to export* any particular model of democracy.”<sup>140</sup> This especially timely stipulation,<sup>141</sup> as with the previous one, reins in the push towards democratization by referencing State sovereignty in relation to political structures.<sup>142</sup> It recognizes a clear role of the human rights regime in a *definitional* sense, but rejects an outright role in a *prescriptive* sense.

### 4.3 Conclusion of Section

Democracy is a dynamic player in the maneuverings of the human rights regimes and international trends. This dynamism does not alter the core standards or minimal requirements of democracy that have been previously laid out, but rather broadens the scope of democratic influence through the lens of the human rights regime. The human rights institutions use democracy in a wider, more holistic sense, thereby strengthening its potency, influence, and legitimacy in the international legal community.

---

<sup>140</sup> UNCHR Resolution 2005/29 Art.3 (emphasis mine)

<sup>141</sup> Pratchett (2004) section “Problems, challenges and opportunities: *Challenges*”: “In particular, the challenge is one of concomitant convergence around core beliefs, rules and institutions while, at the same time, seeking to protect and encourage local, national, regional and local differences and identities. As the only body to which all European democracies accede, the Council of Europe has an important role to play in balancing these challenges.”

<sup>142</sup> UNCharter Art.2.1, Art.2.4

## 5 The Current Debate: The Value of Human Rights Discourse

UNCHR Resolution 1999/57 is titled “Promotion of the right to democracy.” The Resolution does not unequivocally claim a right to democracy, but rather takes a path similar to that has been laid out in this paper, that of arguing that the “fundamental democratic rights and freedoms”<sup>143</sup> are based in human rights law. This resolution is the most broad-sweeping, and has the highest acceptance vote and the fewest abstentions of any of the resolutions dealing primarily with democracy. The “right” to democracy is not mentioned in future resolutions. Shying away from the term signifies a marked reluctance, but does not cut to the validity of a possible right. As numerous resolutions continue to lay out the standards and scope of democratic requirements and relationships, and the CoE and the OSCE continue to make passionate commitments to democracy, and with the increasing number of election-monitoring activities of the UN and seminars and forums of the various organizations, the assertion of a “right” grows in strength and in content and moves steadily toward a more enumerated vision and so becomes more right-like.

### 5.1 An Emerging Right to Democracy

The political science literature concerning this topic tends to argue an *emerging* right to democracy based primarily on UN election monitoring activities. The pivotal article “The Emerging Right to Democratic Governance” by Thomas M. Franck approaches the subject from an international relations avenue and thus sees democratic entitlement on a continuum of normative progression.<sup>144</sup> The approach focuses on trends which slowly modify the requirement of international legal sovereignty and may lead to a requirement of democratic governance for the international recognition of legitimate statehood. This argument is constructed by using human rights as a support rather than a driving force. The article links democracy to some human rights arguing the standards of democracy are primarily self-determination, freedom of expression, and the right to free and open elections.<sup>145</sup> Groundbreaking in its topic and argument, the article limits the scope of democratic entitlement too narrowly by focusing too lightly on human rights, as does the subsequent

---

<sup>143</sup> UNCHR Resolution 1999/57 Preamble §6

<sup>144</sup> Franck (1992)

<sup>145</sup> Franck (1992) p.52

outpouring of literature.<sup>146</sup> Franck partially justifies this by noting that when the UN was asked to monitor the Nicaraguan Sandinista elections in 1989, the Secretary General linked his acceptance of the request to the norms of the international system, not the human rights framework.<sup>147</sup>

Franck makes some dynamic references to the human rights regime. He notes that democracy can be linked to the UN's most important norm: that of the right to peace.<sup>148</sup> He argues that when considering intervention in protection of the democratic entitlement by the international community, human rights can be used as a legitimizing factor due to its "...various intrusive forms of monitoring and even [its] envisages [of] sanctions against gross violators."<sup>149</sup> Though perhaps placing too much emphasis on "intrusive" monitoring, this is the most potent argument for a human-rights-based conception of democracy offered by this perspective. However, this argument is overly simplified and perhaps too postulational. As argued earlier, the structure and content of many human rights norms and obligations give substance and conceptual validity to a democratic requirement. These works unfortunately prefer the more stream-lined and political route of the assurance of free and fair elections through monitoring.

## 5.2 Human Rights as the Basis of the Claim

Within the last few years, the human rights regime has begun to make a distinctive mark on this debate and has begun to help dictate the debate's structure and content. As Franck and many others have noted, the primary concern for an emerging right to democratic governance is the legitimacy of the international community infringing or commenting on State sovereignty concerning political structure.<sup>150</sup> If human rights are used as the basis for the claim of the right to democracy (and not simply a supporting element) the issue of breaking into and reformulating what legitimizes international legal State sovereignty is

---

<sup>146</sup> Democratic Governance and International Law (2000)

<sup>147</sup> Franck (1992) p.80

<sup>148</sup> Franck (1992) p.87

<sup>149</sup> Franck (1992) p.89 emphasis original

<sup>150</sup> UNCharter Art.2.7

already dealt with in the codified human rights Conventions in which States have agreed to limit their conceptions of sovereignty in light of considerations of universal norms.<sup>151</sup> Sovereignty is addressed by the international systems inward toward the State through obligations; sovereignty of the State is validated from the inside outward through human rights protection and promotion within the State. This intimate relationship between governance and human rights is solidified through recognition of the political dimension of human rights requirements. The discourse of human rights has already built roads into the legitimacy of sovereignty, those promoting democracy as imbedded within human rights can then make ample use of the human rights discourse to assert its validity.

Sergio Vieira de Mello (the former High Commissioner for Human Rights) introduced the term “holistic democracy” in 2002 at the Seminar on the Interdependence Between Democracy and Human Rights. Democracy in this sense involves, “the procedural and the substantive, formal institutions and informal processes, majorities and minorities, male and female, government and civil society, the political and economic, the national and the international...[a democracy that is] greater than the sum of its parts.”<sup>152</sup> Holistic democracy finds its normative basis in human rights standards and “attends both to the particular substantive content of those standards, and to their interdependence.”<sup>153</sup> The multilayered make-up, one that goes beyond simple freedom of expression and the requirement of a ballot box, finds strength in the consistency and legitimacy of the already established realm of human rights law, and it contributes to the maintenance and legitimacy of the human rights regime. It is then a weight-bearing support of, as well as an affirmation of, the inviolability of the nation-state.

### 5.3 Building a Regime

There are two main ways to approach the *right* to democracy. First, international relations show an increasing and fast-paced trend toward democratization and international

---

<sup>151</sup> *Military and Paramilitary Activities in and against Nicaragua* §259: ruling a State “is sovereign for the purpose of limiting its sovereignty in this field.”

<sup>152</sup> Vieira de Mello (2002) p.3

<sup>153</sup> Vieira de Mello (2002) p.4



legitimacy becoming somehow predicated on an emerging democratic requirement built primarily on election monitoring and the threat of intervention in undemocratic coups. The second approach, that of holistic democracy, sees a right built on the shoulders of other rights, a logical extension of an already codified system, and perhaps even more than that, a right which is imbedded in the obligations already required of State Parties to human rights conventions. It is this second conception, that of an *implicit* right to democracy, which is most logically consistent with the fundamental principles and standards of democratic theory and which is of such a comprehensive nature that it reinforces the accepted maxim that democracy promotes peace. It is only when this right is acknowledged (rather than built) do nations truly understand the extent of their obligations, for "...democracies which violate human rights are not only threatening individuals, they are threatening themselves. It is democratic suicide."<sup>154</sup>

Beginning from this second approach of an implicit right to democracy, it is possible to see that a regime is quickly being built to support the claim to this right. A "regime" is "a set of principles, norms, rules and procedures, including coercive measures of various kinds, which govern the relationships between States and determine which kinds of behaviour are legitimate and which are to be considered dysfunctional."<sup>155</sup> This new regime of democratic requirement is, arguably, being first formulated in the human rights regime and, as it continues to gather strength and momentum, it will soon form its own separate source of validity and modes of operation.<sup>156</sup> The value of human rights discourse then is that it provides a forum in which the democratic entitlement regime can be effectively constructed.

---

<sup>154</sup> Davis (2007) p.2

<sup>155</sup> E/CN.4/Sub.2/2001/32 §79

<sup>156</sup> E/CN.4/Sub.2/2001/32 §80: "Because of the existing interdependence between human rights and democracy, because of the normative, conceptual and instrumental links between the various international instruments governing them, and because human rights and democracy are materially and conceptually difficult to separate in practice, the emerging international regime on democracy, before asserting itself in its own right, is tending to form part of the international human rights regime."

## 5.4 A Right to Claim

There is also a theoretical requirement of democratic governance which has yet to be addressed: what a “right” entails. As Henry Shue explains, rights must be socially guaranteed;<sup>157</sup> they must be considered legitimate *claims*. Though it is possible for one to enjoy the substance of a right such as the right to privacy, without actually having a forum or mode of claiming that substance, this would result in the situation where the substance of the right would not correlate to a right at all, but would rather correlate to a good.<sup>158</sup> It is only when there exists “(1)...rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats”<sup>159</sup> that an actual *right* exists. Shue goes on to argue that participation is a basic right: “participation is [not] sufficient for the exercise of other rights, but...it is necessary.”<sup>160</sup> Accepting that participation is a fundamental aspect of democracy and the true well-spring of the core of democratic governance, democracy being a basic right in this sense is better posited as a *right to claim* other rights.

## 5.5 Moving On

Having established that the core standards and requirements of democratic governance are so solidly grounded in international human rights law and are so interconnected with its operation and purposes as to make it an inherent or implicit requirement of legitimate international legal sovereignty, the practical concerns of this requirement enter into the discussion. The next few chapters look at the specific country situations of both the US and of Norway. A picture of how democracy fits into national sovereignty and into country-specific conceptions of human rights will be composed by melding sources of history, legal theory, and political theory.

---

<sup>157</sup> Shue (1996) p.13

<sup>158</sup> Shue (1996) p.74-78

<sup>159</sup> Shue (1996) p.74

<sup>160</sup> Shue (1996) p.85

## **6 Practical Considerations:**

### **Human Rights and Democracy in The United States**

#### **6.1 Intro**

The U.S. was a major player in the drafting of the UDHR and was generally enthusiastic about the international human rights regime until the 1950s. Since that time the national and political tone has fluctuated but the one element that seems to have remained is a steadfast commitment to separation between State and (what is perceived to be) supra-state.

U.S. politicians and citizens tend to conceive of human rights as a concern for foreign policy rather than national internal policy; “Americans generally think of human rights law as protection for oppressed people in distant places, people denied their civil and political rights.”<sup>161</sup> Having pushed human rights into the realm of foreign policy considerations only seems natural when it is understood that U.S. citizens believe their government to not only be the source of human rights, but also the exemplifier of them: “For most Americans human rights are American values writ large, the export version of its own Bill of Rights.”<sup>162</sup> This understanding helps to clarify why the U.S. has expressed fidelity to human rights conceptions without wholly subjecting itself, the self-proclaimed prime example, to international standards.

Despite the boastful and patronizing tone concerning human rights values, this attitude is not without some merit. The U.S. has one of the oldest successful Constitutions in the world. The country has faced few (if any) popular attempts at revolution from within since the Civil War. It has a long-standing tradition in successful democracy and “...has had a distinctive history of political stability, which increases its sense of political self-sufficiency and reduces incentives to stabilize its own institutions with foreign treaties.”<sup>163</sup> Overall, the American “project” has been an overwhelming success. The U.S.’s place as a political, economic, and military superpower allows it to sustain its role in the international

---

<sup>161</sup> Stark (2000) see footnote p.79

<sup>162</sup> Ignatieff (2005) p.13-14

<sup>163</sup> Ignatieff (2005) p.17

arena without needing to acquiesce much of its sovereignty to international standards. The U.S. believes it is at the top of the world due to its particular character, any infringement on that character would be inappropriate and inconsistent with the good.

The ICCPR does not require a specific method of implementing the provisions it contains, though it is without question that securing these provisions is the aim and requirement of the treaty.<sup>164</sup> Ratification of the ICCPR does not have to be unconditional; it can be valid to, as appropriate, make reservations, understandings, and declarations (RUDs) conditioning the application of the treaty.<sup>165</sup> These methods are meant to allow for particularities between Member States as well as facilitate implementation into domestic practice.<sup>166</sup> The U.S. has made use of these conditioning methods in the ratification of the ICCPR; it is these conditional methods that expose the underlying conflict between the U.S. conception of democratic sovereignty and subservience to international obligations.

#### 6.1.1 The Problem of Implementation

The U.S. legal system, being a dualist system, conceives of domestic law and treaty law to be two different sets of law and domestic law is used to determine the status of international law in the courts.<sup>167</sup> The “supremacy clause” in Article VI of the Constitution places ratified treaties on the same level as national legislation. This status equates federal law and treaty law, making them both the supreme law of the land. “When the two relate to the same subject, the courts will endeavour to construe them so as to give effect to both, if that can be done without violating the language of either; if the two are inconsistent, the one last in time will control the other, provided that the treaty on the subject is *self-*

---

<sup>164</sup> ICCPR Art.2.2

<sup>165</sup> A State may also make derogations in times of emergency, see ICCPR Art.4

<sup>166</sup> In the sense of facilitating implementation, it is generally understood that such RUDs should be removed as soon as national barriers to implementation have been overcome (they are meant to be temporary in nature).

<sup>167</sup> Bradley (2000) p.36

*executing.*”<sup>168</sup> Barring any RUDs, this would mean that the ICCPR (after ratification) would be directly applicable in U.S. courts.

The potential influence of treaty law is what lead to the U.S.’s conditional consent. The U.S. role in human rights activism, originally being one of leadership, significantly changed direction during the Eisenhower administration. During this time, Senator John Bricker (R-OH) initiated a series of proposed amendments to the Constitution which are collectively called the “Bricker Amendment.”<sup>169</sup> The proposed effect of these amendments would be to alter the status of treaties so that they would become non-self-executing as a rule and thus have no direct impact.<sup>170</sup> The main motivation behind these amendments (which were quite well supported in the Senate, though never reached the two-thirds majority required for passage) was to stop international law from perceived infringement on the democratic legitimacy of national domestic law. According to the U.S.’s conception, legitimacy of laws in a democracy come from the bottom-up, not from the top-down. It was fear of the UN and its human rights provisions which inspired this movement to reject international treaties as a legitimate source of law in American democracy.<sup>171</sup>

The Bricker Amendment failed, most particularly due to John Foster Dulles (Secretary of State), who promised the Senate that the U.S. would not ratify the human rights treaties (ICCPR, CESCR specifically). Later that year, the State Department seemed to confirm the essence of the Bricker Amendment when it stated that:

Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. Treaties are not to be used as a device for the purpose of effecting internal social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.<sup>172</sup>

---

<sup>168</sup> Williams (1993) p.44 emphasis mine

<sup>169</sup> see *inter alia* Bradley (2000) p.14

<sup>170</sup> see *inter alia* Bradley (2000) p.14

<sup>171</sup> Hannum (1993) p.14

<sup>172</sup> 11 F.A.M. 700, 796 (State Department Circular No. 175) referenced in Hannum (1993) p.15

It wasn't until the Carter administration (1977-1981) that human rights treaties entered into the political scene again. In 1978 President Carter submitted the ICCPR, CESCR, CERD and the ACHR to the Senate for advice and consent. However, the Senate did not vote on the Conventions at that time and the Regan administration did not show any interest in ratifying. The treaties were still pending before the Senate when George H. W. Bush brought the Conventions back into consideration along with a proposed package of RUDs. There were five direct reservations proposed to various rights within the ICCPR and several declarations of understanding.<sup>173</sup> The Senate approved the ratification of just the ICCPR with the package of RUDs intact in April of 1992.

The view of the Foreign Relations Committee in considering ratification was that ratifying the Covenant would not require any subsequent legislation.<sup>174</sup> Where U.S. law seemed to be in direct conflict with the Covenant, reservations were put in place. The package of RUDs included a declaration of understanding which established the Covenant as non-self-executing, meaning that the treaty is not directly enforceable as legislation nor as judicial precedent or guidelines. The package of RUDs, especially this last stipulation, was meant to render the Covenant powerless in relation to the domestic legislative and judicial systems.<sup>175</sup>

### 6.1.2 Reasons for the RUDs

The RUDs are meant to distance domestic law from international law and shelter the courts or legislature from the effects of the ICCPR. The source of this desire to isolate U.S. law from international law is the U.S.'s persistent affirmation of the legitimacy of its democratic decisions as not only being the only acceptable law, but also the core of American identity. The reasons for the RUDs overlap and inform one another, but can be separated into two general categories: legal and cultural.

---

<sup>173</sup> five reservations, five understandings, four declarations

<sup>174</sup> Cerna (2000) p.98

<sup>175</sup> Ignatieff (2005) p.6: "Thus, with a few exceptions, American ratification renders U.S. participation in international human rights symbolic, since adopting treaties does not actually improve that statutory rights protections of U.S. citizens in domestic law."

#### 6.1.2.1 Cultural Reasons for the RUDs

The particular American experience is thought to be based on the successful democratic structure built by the founding fathers. The U.S. Constitution asserts American identity through its system of government and thus part of being “American” is believing and adhering to democratic principles:

...this concern to ward off foreign influence is more than just a powerful state’s attempt to make the rules and exempt itself from them. The United States defines these exemptions in terms of the democratic legitimacy of its distinctive rights culture. The rights that Americans accept as binding are the ones written down in their own sacred texts and elaborated by their own courts and legislature. These rights, authored in the name of “we the people,” are anchored in the historical project of the American Revolution: a free people establishing a republic based in popular sovereignty...the United States is defending a mission, an identity, and a distinctive destiny as a free people.<sup>176</sup>

In this way, politics molds the American consciousness. Democracy is an expression of the American way, and so is a good in and of itself.<sup>177</sup> Contrastingly, international human rights are perceived to place government as the means to an end, the method by which human rights should be ensured.<sup>178</sup> An implicit right to democracy may serve to alter this supposed distinction and perhaps help to bridge this schism.

Some U.S. scholars suggest that Europe has more to gain from submitting their countries to supra-national instruments and bodies because they lack stability or faith in their domestic systems:<sup>179</sup> “Their politics and their economies have indeed failed, and repair is to come from a transnational order.”<sup>180</sup> The U.S., having its own perceived fidelity to human rights already within its Constitution, and having a history of successful political governance, has “...no similar perception of failure...and, therefore, no sense of a need to participate in the remedy.”<sup>181</sup> It seems the U.S. would do better, by way of maintaining its democratic

---

<sup>176</sup> Ignatieff (2005) p.14

<sup>177</sup> Kahn (2005) p.217-221

<sup>178</sup> Kahn (2005) p.217-221, p.218: “The internationalization of human rights law, represents just the opposite set of beliefs: politics is instrumentalized; it is a means to an end located in the well-being of the individual.”

<sup>179</sup> Bradley (2000) p.57

<sup>180</sup> Kahn (2005) p.217

<sup>181</sup> Kahn (2005) p.217

integrity, to go without international solutions to (what are conceived to be) national problems.

The U.S.'s understanding of its special history is inseparable from its fidelity to democracy as both an assertion of internal identity (identity of the citizen) and external identity (the core of a world superpower). The democratic identity of the U.S. is prohibiting the acceptance of a limited sovereignty from the international regime of human rights. Any international infringement on sovereignty, or even the suggestion of it, is perceived as an insult to the power and prestige of the U.S. The U.S. also sees human rights as a particularly American concept and thus does not accept the validity of outside commentary on the content or objectives of issues tied to the U.S. Constitution (primarily the Bill of Rights).

#### 6.1.2.2 Legal Reasons for the RUDs

The general legal perception is that the ICCPR formulation of rights is too vague and too broad. It is thought that the rights themselves leave considerable room for uncertainty in terms of scope and applicability.<sup>182</sup> The natural response to this point is that the General Comments, Committee Reports, and jurisprudence of the HRC are adequate to define the rights in more particular terms. The U.S. however, has made it relatively clear, though not particularly explicit, that it does not consider the HRC to have "official interpretative authority over the ICCPR."<sup>183</sup> In particular, the U.S. has rejected the HRC's stance on reviewing and passing judgement on RUDs. GC-24 (specifically directed at the U.S.) stated that it was within the power of the HRC to decide whether particular RUDs were compatible with the object and purpose of the treaty and if the RUDs were deemed inadmissible, the State Party is bound to the treaty without the benefit of the offending RUD. The U.S. has viewed the Covenant as particularly concerned with securing a high number of ratifications and therefore argues that the Covenant should be quite liberal in

---

<sup>182</sup> Bradley (2000) p.55

<sup>183</sup> Bradley (2000) p.56-7



allowing RUDs.<sup>184</sup> With this mechanistic approach to the Covenant, the U.S.’s core assertion is that if a RUD is deemed to be incompatible with the treaty, then that RUD is not severable from the ratification of the treaty, and thus the treaty would then no longer be applicable to the State Party.<sup>185</sup> This argument affords the U.S. an upper-hand in all dealings with the Covenant. The seemingly incompatible or offending RUDs should, by this argument, be seen through the lens of quantitatively gaining ratification, and without the RUD that gain is lost. The U.S. then has not only set the rules for the game, but also threatens to leave if it doesn’t get things its own way. The U.S. is afraid it may disagree with the stance of the HRC on an issue and find itself abiding by conditions which it never intended to abide by and find itself tied to a legal obligation that would be completely without democratic merit.

A second legal reason for rejecting a self-executing stance on the ICCPR is what Frank Michelman terms “integrity-anxiety” in which the U.S. judiciary is concerned with maintaining “stable, continuous, and legitimate” legal interpretation.<sup>186</sup> Using a comparative approach to law through international standard setting or through jurisprudence from other nations would threaten the stability, and perhaps then the validity, of the U.S. system of laws. In addition to this, it is argued that U.S. judges generally find foreign law too liberal “...on issues like the death penalty, abortion, sentencing, and so on—and [these liberal attitudes] should be resisted as alien to the American mainstream.”<sup>187</sup> In general then, there seems to be conflict between the values of the U.S. system versus other democratic states and international human rights norms.<sup>188</sup>

These legal concerns follow from a genuine fear that international law will interfere with the sovereignty of the judicial decisions of U.S. courts. It seems that the particular nature of human rights, one claimed to be rooted in the *universal* dignity of the human person, is not considered a mitigating element in the consideration of American exceptionalism.

---

<sup>184</sup> Shabas (2000) p.118

<sup>185</sup> Shabas (2000) p.119

<sup>186</sup> Ignatieff (2005) p. 9

<sup>187</sup> Ignatieff (2005) p. 9

<sup>188</sup> Ignatieff (2005) p. 10

## 6.2 Concluding Remarks on the U.S. as a Leader and as an Outlier

The U.S. does not see itself as so much of an exception to human rights norms in general, but rather as an exception to *international* human rights norms. The particular culture and history of the U.S. as a so-thought model of democracy informs the rejection of an honest approach to the ICCPR's requirement of treaty implementation. It seems easy to paint the U.S.'s approach to international human rights law as arrogant, petulant, and hypocritical. However, it is perhaps more accurate to see its approach as an outgrowth of a particularly dated conception of democracy, and an insistent faith in, and aggressive reactionary protection of, that conception. The U.S. does not view international human rights and national democracy to be interconnected nor mutually interdependent and therefore finds no basis in fidelity to a universal definition of democratic standards.

Still, is an attachment to Westphalian-like sovereignty and nation-specific moral claims really all that bad? The U.S. widely secures civil and political rights and has played a valued role on the international stage.<sup>189</sup> The particularity of the U.S.'s belief in its own value as being one separate and apart from the rest of the world doesn't seem to be an indication of a truly renegade outlier, but rather an indication of stubbornness and self-righteousness. Is the harm in that so great? The cost benefit equation may best be put in this way:

As a language of moral claims, human rights has gone global by going local, by establishing its universal appeal in local languages of dignity and freedom. As international human rights has developed and come of age, not much attention has been paid to this process of vernacularization. We must ask whether any of us would care much about rights if they were articulated only in universalist documents like the Universal Declaration, and whether, in fact, our attachment to these universals depends critically on our prior attachments to rights that are national, rooted in the traditions of a flag, a constitution, a set of founders, and a set of national narratives, religious and secular, that give point and meaning to rights. We need to think through the relation between national rights traditions and international standards, to see that these are not in the antithetical relation we suppose. American attachment to its own values is the

---

<sup>189</sup> The so called War-on-Terror may have changed this protection dramatically. The P.A.T.R.I.O.T. Act has eroded some of the most basic freedoms and protections. There is unfortunately not enough time or space to address this issue, but it should be noted as an important new development. The idea that democracy must make some fundamental concessions to protect itself is a radical idea but does seem to have some consistency with the US perception of democracy.

condition and possibility of its attachment to the universal, and it is only as the universal receives a national expression that it catches the heart and the conviction of citizens.<sup>190</sup>

Recognizing an implicit right to democracy has the possibility of broadening the definition of democracy to bridge the gap between American attachment to its particular values and international human rights norms. However, the case for this looks grim. Just as the U.S. conception of democracy has dictated its resistance to international norms, so it seems equally likely that it will dictate the rejection of any more modern redefinition of democratic standards. The U.S. is dearly attached to its long history of successful democracy in contrast to the perceived democratic failures in Europe, it is this rich history that seems most detrimental to the possibility of securing true and honest implementation of international civil and political norms for the American citizenry. With the UN so persistently promoting democracy we are left to wonder if this is a case of having to be careful what you wish for, or instead, if the concept of an implicit right is able to gain traction, will it leave the U.S. to be the lone defender of a simplistic and archaic notion of a glorified right to vote?

---

<sup>190</sup> Ignatieff (2005) p.25-26

## 7 Practical Considerations:

### Human Rights and Democracy in Norway

#### 7.1 Intro

Nordic social values have structured and informed the Norwegian State and the laws governing that State. These social values partially stem from the Protestant Christian virtues espoused by Martin Luther. Though not the only structuring influences, these values played a role in the formulation of the Norwegian welfare state.<sup>191</sup> Putting it rather simplistically, Lutheranism argues that the divine gospel induces one to help one's neighbor.<sup>192</sup> This eventually translated into government responsibilities through the secularization of religious ethics;<sup>193</sup> the welfare state is tied strongly to the Norwegian conception of the moral good.<sup>194</sup>

This welfare state mentality is seen also through legal principles and conceptions in Norway:

A sense of solidarity and mutual dependence is part of legal understanding. Solidarity is not simply an ethical concept, but could be seen as a legal concept. Following the recognition ("Anerkennung") we speak of people recognizing each other both as right-holders and as subjects in need of care and welfare, that is, as beneficiaries of social rights. The social contract, accordingly, recognizes the differences between us in our need for care and protection, but at the same time affirms our equality. We may then argue that it makes sense to speak of the Nordic social model as a general cultural foundation on which the law is built.<sup>195</sup>

This sense of solidarity has a communitarian tinge. While there is strong protection of individual interests, there has typically been less focus on individualized rights due to the fact that they seem divisive.<sup>196</sup>

---

<sup>191</sup> Husa (2007) p.24

<sup>192</sup> Husa (2007) p.24

<sup>193</sup> Husa (2007) p.24: "Martin Luther himself raised the issue of poverty, urging that every city should look after its own poor. This was clearly an expression of a new type of understanding of Christianity, an optimist and secular one."

<sup>194</sup> not necessarily the "religious" good, note Husa (2007) p.27: "A protestant basis has meant that the idea of rational planning of a society has been fostered without any strong religious preconceptions."

<sup>195</sup> Husa (2007) p.22

<sup>196</sup> Scheinin (2008) p.150

This sense is coupled with a long-standing trust in the Norwegian government as the protector of the people.<sup>197</sup> There is a distinct air of State-friendliness<sup>198</sup> with which the State functions as a paternalistic figure rather than a functionary of a Hobbesian like social-contract. This is markedly at odds with the protective model of democracy commonly held by nations outside of the Scandinavia.<sup>199</sup> The protective model sees democratic functioning as the shield wielded by the citizenry against a possibly intrusive State hostile to the interests of the individual.<sup>200</sup> Democracy in Norway does not seek to encroach on State power but rather simply to influence it.<sup>201</sup> This is shown, *inter alia*, through the value democratic governance has in legal legitimacy:

There is little doubt that Nordic courts usually judge in line with the ruling majority, making the judge more of a civil servant than an independent actor. In Nordic legal doctrine, one finds the fear of an overly independent judiciary that may jeopardize democratically enacted legislation regularly expressed.<sup>202</sup>

However, in recent literature concerning the status of Norwegian democracy this role of the court as a civil servant has waned with the erosion of Norwegian democracy and the process of judicialization.<sup>203</sup>

## 7.2 The Problem of Implementation

Norway was one of the original signatories to the ECHR. It was widely held that Norwegian law already secured the rights within the Convention and, with what Martin Scheinin calls “Nordic arrogance,” believed that Norway would serve as a standard-setting model to other nations attempting to implement the obligations of the Convention.<sup>204</sup> There was originally one reservation made on Art.9 concerning Norwegian policy towards Jesuits, but the Constitution was amended concerning this discrepancy and the reservation

---

<sup>197</sup> Husa (2007) p.37

<sup>198</sup> Selle (2006) p.552

<sup>199</sup> Selle (2006) p.552

<sup>200</sup> Selle (2006) p.552

<sup>201</sup> Selle (2006) p.552

<sup>202</sup> Smits (2007) p.60

<sup>203</sup> see literature concerning the Norwegian Power and Democracy Study (Makten og Demokratiet) this topic will be explored more below

<sup>204</sup> Scheinin (2008) p.136-137

was subsequently removed.<sup>205</sup> There was some consideration of whether Art.32 of the Convention concerning whether the competence of the Committee of Ministers would conflict with Art.1 of the Norwegian Constitution stating that “...the Kingdom of [Norway] is a free, independent, indivisible and inalienable realm.”<sup>206</sup> This contention however was rejected by the Storting and the ECHR ratification was approved without any further concerns regarding implementation.

Norwegian law also follows a dualist system in which international treaty is not immediately implemented into domestic law without action by the legislature. Because of the perceived compatibility between Norwegian law and the ECHR, the Convention was approached through the method of passive transformation.<sup>207</sup> This approach generally excluded much of the judicial consideration of the ECHR from domestic law interpretation. It wasn't until the 1980s and 1990s that the ECHR provisions began to be taken into account in administrative and judicial decision-making.<sup>208</sup> At this time, Norwegian courts clearly preferred to use the ECHR as a reference point for their decisions:

From an analytical point of view, this establishment of conformity of domestic law with the Convention may undoubtedly be regarded as a direct application of the Convention, because the Convention in such cases has formed an integrated part of the Court's reasoning. In other words, the Convention has been applied as a *source of law*.<sup>209</sup>

In addition to this, the courts were also explicitly referencing the Strasbourg decisions and using them to revise their own case law.<sup>210</sup> Thus the approach of passive transformation bled a bit more actively into the judicial system than originally thought necessary.

Taking note of this increasingly influential role of the ECHR on domestic legal practice, Art.110c was inserted into the Norwegian Constitution in 1994. It required the authorities of the State to “...respect and ensure [international] human rights” and that “[p]rovisions

---

<sup>205</sup> Jensen (1992) p.33

<sup>206</sup> Jensen (1992) p.33

<sup>207</sup> *inter alia* Scheinin (2008) p.136-137

<sup>208</sup> Scheinin (2008) p.139

<sup>209</sup> Jensen (1992) p.107

<sup>210</sup> Jensen (1992) p.158

on the implementation of treaties on human rights shall be prescribed through Law.”<sup>211</sup> This Article was considered to be the “...legitimation of the competence of Norwegian courts to apply the ECHR and other human rights treaties even if they formally were outside the domestic legal order.”<sup>212</sup>

This legitimation was taken further in the 1999 Human Rights Act. This Act gave the ECHR (as well as the ICCPR and CESCR) the legal status of domestic law and specified that if there were conflicts between other domestic laws and the Conventions, the Conventions would take precedence.<sup>213</sup> Passive transformation was then discontinued and the ECHR became applicable in the courts and became a direct consideration for the drafting of new legislation. The courts of Norway now use the Conventions included in the HRA1999 directly. For example, before the case of *Folgerø and Others v. Norway* was referred to the ECtHR, the Norwegian courts used a combination of the provisions of the ECHR and the ICCPR as well as case law from the ECtHR and precedent from the HRC to decide the case at the national level.<sup>214</sup>

### 7.3 Human Rights in Norwegian Law

Traditionally the role of the Norwegian courts was to support the decisions of the legislature, the legislature being the democratic organ and thus the most legitimate decision making body.<sup>215</sup> However, the 1999 Human Rights Act<sup>216</sup> brought a strengthening of the courts which has generally been referred to as judicialization:

Some experts have seen this development as a risk to democracy, while other meet it with satisfaction as an element in the transition to a European conception of rights where genuine individual rights have a recognized special (higher) status among sources of law. Some say that the growing role of the courts means that the judiciary is

---

<sup>211</sup> referenced in Scheinin (2008) p.142

<sup>212</sup> Scheinin (2008) p.142

<sup>213</sup> Focus on Human Dignity: A Plan of Action for Human Rights p.20

<sup>214</sup> *Folgerø and Others v. Norway* Section b: §30-42

<sup>215</sup> Scheinin (2008) p.136

<sup>216</sup> along with the Europeanization movement

obtaining more and more *political power*, while others think that what is moving is the dividing line between politics and law.<sup>217</sup> Partially the concern is that the dictates of international law are not always clear or well enumerated and the ECHR in particular has evolving standards which leads the implementation of the obligations to be one in which courts seem to have a particularly legislative-like role.<sup>218</sup>

Still, with the Norwegian Lutheran history and a strong conception and perpetuation of the welfare state in combination with the so-called Nordic arrogance mentioned earlier, one may assume that Norway would be comfortable with instating international human rights norms into domestic law. Norway has made it clear that human rights are a cornerstone of government policy and that that it is the spearhead of developments within the field of human rights.<sup>219</sup> However despite all this, Norway is not comfortable and international human rights obligations causes several concerns for the State. The problem of implementation and judicialization is a two-tiered attack on Norway's self-perception. The first tier is the already addressed problem of democratic legitimacy. Historically the role of the judiciary was to affirm and implement the legislation of the democratic majority, now the judiciary is taking precedent from outside the nation to dictate the aspects of the social welfare state, which Norway views with pride as part of its own particular character. It was the original belief that Norway would be the model to the rest of the world, not the one being molded. The second tier of this problem is that international human rights are constructed in a protectionist manner in which individualism is strongly guarded against State interference. This goes against the solidarity aspect of Norwegian self-identification: "The New and strengthened role of individual rights has contributed towards a certain

---

<sup>217</sup> Scheinin (2008) p.149-150

<sup>218</sup> Selle (2006) p.563: "The increased power of the judiciary, not least the international ones, originates from the fact that international statutes are unclear and general, giving much leeway to legal interpretation, and the fact that rights conventions are often contradictory, with the power of making binding priorities left to decisions in court appeals. Judicialization in this sense does not thus indicate a strengthening of the rule of law, but an obliteration of the division between legislation and legal interpretation."

<sup>219</sup> Focus on Human Dignity: A Plan of Action for Human Rights p.10/7



individualistic tendency that can be seen as alien to the Nordic ‘social democratic’ or egalitarian ideology.”<sup>220</sup>

Norway’s focus and identity is related to the social welfare system of the State. The secularized moral values of the Lutheran tradition, contributing to an egalitarian system with strong bonds of solidarity, are also interwoven into democratic legitimacy. If this system, whose self-conception is one of a strong protector of human rights at home, and a valuable promoter of human rights abroad,<sup>221</sup> takes issue with international norms infringing on national democratic space, then what is to be said for the interdependence between international human rights and democracy? The recently conducted study on *Makten og Demokratiet* unequivocally claims that Norway’s democracy is eroding, and one of the many reasons for this erosion is the judicialization process in relation to human rights.<sup>222</sup> Norway, despite being predisposed to a human rights mentality and being, comparatively, accepting of international norms, faces very similar issues to the U.S. in this regard. If one of few successful welfare States in the world cannot seem to bridge the conceptual gap between democracy and human rights protection and promotion, what then can we expect from others?

---

<sup>220</sup> Scheinin (2008) p.150

<sup>221</sup> Focus on Human Dignity: A Plan of Action for Human Rights p.83: “We who live in a society possessing relatively effective protection of human rights have a moral duty to assist those who are not so fortunately placed.”

<sup>222</sup> Østerud (2006) p.37-39

## 8 Conclusion

Democracy and human rights are strengthened and validated in connection with one another. The first part of the thesis shows that the core standards, the necessary institutions, and the current trends of democracy can be found in codified human rights standards and developments in the human rights field. The scope of these standards can then be defined and secured with a legal balance between the needs of society and the rights of the individual. The study has shown that particular consideration of the needs of a democratic society is not necessary for human rights and democracy to be intertwined and interdependent—it is a natural union. Human rights are validated in democratic theory in that a democratic polity is the most assured way to implement and protect human rights, it is logically consistent with the combined requirements of the provisions of the Conventions, and it is the most consistent expression of the ability to claim rights.<sup>223</sup>

The practical problem seems to lie in the internationalization of human rights. Democracy is naturally an assertion of national Westphalian-like sovereignty in that it, when viewed in a less-holistic sense, reserves legitimacy for internal decision-making. The international aspect of the human rights regime subverts this sovereignty to stipulations of the international legal system. If human rights were universal norms in the operable sense, then internationalization wouldn't matter very much; national human rights norms would be the same across the board. However, for obvious reasons this is not the case and the UN and the CoE have served as mediating bodies in this regard. In this system some aspect of sovereignty is sacrificed by the nation when it ratifies human rights documents.<sup>224</sup> In the case of both the U.S. and of Norway, neither originally perceived or wanted their ratification to affect their sovereignty: the U.S. rejected the validity of ICCPR influence on national norms, and Norway believed it had already implemented the requirements of the ECHR.

---

<sup>223</sup> and thus is connected to the grounding of human rights- self-determination

<sup>224</sup> or even when it does not ratify the documents but rather is expected to abide by customary norms. Some sovereignty, in this sense, is sacrificed just by being part of the international community or the human race.

The concept of an *emerging* right to democracy runs into the problem of sovereignty in terms of U.N. Charter Art.2.7. The human rights regime has already established routes into the sovereignty of nations through requirements of obligations to citizens and through monitoring of such obligations. These routes, though admittedly limited in potency, can be used to help deal with this problem in regards to democratization. However, this argument becomes muddled when it is shown that human rights, even for the nations who strongly support them in theory, are practically problematic in their relation to democratic legitimacy.

It is important to place these conceptual issues in context. No theory works out perfectly in practice, and in international issues the most common and probably unavoidable approach to developing trends is a patchwork of motivations, policies, and pressures. Additionally, it is important to note that the human rights regime has made immense headway during the past 60 years and continues at a good pace. So despite this legitimacy gap, human rights are intertwined with an underlying or intrinsic right to democracy and their power and legitimacy should not be overlooked or undervalued. It seems that no matter what, the push towards democracy is going to run into the wall of State sovereignty. Human rights are valuable in their ongoing process of redefining sovereignty and in their ability to flush out the definition of democracy in a way that is more accurate and logically legitimate than the available alternatives.

The U.S.'s drive to remake the Middle East<sup>225</sup> and Norway's new move to obstruct a comprehensive Optional Protocol to CESCR<sup>226</sup> are just some of the signs of the backlash that fidelity to democracy can bring. Still, as discussed in the country studies, it is not an all-or-nothing equation. Democracy and human rights gain traction at the national level when they are directly couched in terms of country-specific values, and this is neither wrong nor is it (on its own) harmful. The human rights players must resist the urge to move

---

<sup>225</sup> Apodaca (2006) p.165-189

<sup>226</sup> Langford (2008)

too quickly or too absolutely into the sphere of sovereignty in this regard. The U.S. is in a far more resistant position than Norway. The U.S.'s outright resistance to international commentary on national legal issues leaves no room for maneuvering. Norway has made room for international obligations and influence and so is somehow swept up into the progressive understandings of international human rights law whether it wants to be or not.

It is without doubt that democracy is an integral part of the goals of the UN and the CoE, and is the best system of government for securing human rights. However, due diligence must be paid to the tensions between democratic decision-making on a national level, and human rights obligations on an international level. Democracy carries the dangers of oversimplification and over-nationalization. A human-rights-based approach will work against these dangers by broadening the definition and requirements of democracy through exposing its more holistic nature, and shall do so in the years to come, but is clearly not a catch-all fix. Rather human rights are a dynamic player in this new field and should have a strong role in the emerging conceptions of the definition and requirements of democracy in the decades to come.

## References

### Books and Articles

Apodaca, Clair. *Understanding U.S. Human Rights Policy: A Paradoxical Legacy*. New York, (Taylor & Francis Group) 2006

Beetham David, Kevin Boyle. *Introducing Democracy: 80 questions and answers*. Paris, (Polity Press Unesco) 1995

Bradley Curtis A., Jack L. Goldsmith. *Treaties, Human Rights, and Conditional Consent: Public Law and Legal Theory Working Paper No. 10*. Chicago 2000.  
[http://papers.ssn.com/paper.taf?abstract\\_id=224298](http://papers.ssn.com/paper.taf?abstract_id=224298) [Visited 23 April 2008]

Buerghenthal Thomas, Dinah Shelton & David Stewart. *International Human Rights: In A Nutshell*. Third Edition. St. Paul, (West Group) 2002

Dahl, Robert A. *A preface to democratic theory*. Chicago, (Chicago University Press) 2006

Dahl, Robert A. *On Democracy*. New Haven, (Yale University Press) 1998

*Democratic Governance and International Law*. Edited by Gregory H. Fox and Brad R. Roth. Cambridge, (Cambridge University Press) 2000

Forsythe, David P. *Human Rights in International Relations*. Second Edition. Cambridge, (Cambridge University Press) 2006

Freeman, Michael. *Human Rights*. Malden, (Blackwell Publishers Inc.) 2002

Hanski Raija, Martin Scheinin. *Leading Cases of the Human Rights Committee*. Jyväskylä, (Gummerus Kirjapaino Oy) 2003

Higgins, Rosalyn. *Problems & Process: International Law and How We Use it*. New York, (Oxford University Press) 1994

*Human Rights in Perspective*. Edited by Asbjørn Eide and Bernt Hagtvet. Cambridge, (Blackwell Publishers) 1992

Jensen, Søren Stenderup. *The European Convention on Human Rights in Scandinavian Law: A Case Law Study*. Gylling, (Narayana Press) 1992

Joseph Sarah, Jenny Schultz & Melissa Castan. *The International Covenant on Civil and Political Rights: Cases Materials, and Commentary*. Second Edition. New York, (Oxford University Press) 2004

Nowak, Manfred. *Introduction to the International Human Rights Regime*. Leiden, (Martinus Nijhoff Publishers) 2003

Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Second Revised Edition. Kehl, (N.P. Engel Verlag, e.K) 2005

Ovey Clare, Robin C.A. White. *The European Convention on Human Rights*. Fourth Edition. New York, (Oxford University Press) 2006

Shapiro Martin, Alec Stone Sweet. *On Law, Politics, & Judicialization*. New York, (Oxford University Press) 2002

Shue, Henry. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Second Edition. Princeton, New Jersey (Princeton University Press) 1996

*The UN role in promoting democracy: between ideals and reality.* Edited by Edward Newman and Roland Rich. New York, (United Nations University Press) 2004

*U.S. Ratification of the International Covenants on Human Rights.* Edited by Hurst Hannum and Dana D. Fisher. Irvington-on-Hudson, (Transnational Publishers, Inc.)1993

### **Chapters and Articles in Edited Volumes**

Boyle, Alan. *Soft Law in International Law-Making.* In: International Law. New York, (Oxford University Press) 2006. pp.142-158

Cerna, Christina. *The United States and the American Convention on Human Rights: Prospects and Problems of Ratification.* In: The United States and Human Rights: Looking Inward and Outward. Lincoln, (University of Nebraska Press) 2000. pp.94-109

Crawford, James. *Democracy and the body of international law.* In: Democratic Governance and International Law. Cambridge, (Cambridge University Press) 2000. pp.91-122

Fox Gergory H., Brad R. Roth. *Introduction: the spread of liberal democracy and its implications for international law.* In: Democratic Governance and International Law. Cambridge, (Cambridge University Press) 2000a. pp.1-24

Fox, Gregory H. *The right to political participation in international law.* In: Democratic Governance and International Law. Cambridge, (Cambridge University Press) 2000b. pp.48-90

Franck, Thomas M. *The Emerging Right to Democratic Governance.* In: American Journal of International Law. Vol.86 (1992), pp.46-108

Franck, Thomas M. *Legitimacy and the democratic entitlement*. In: Democratic Governance and International Law. Cambridge, (Cambridge University Press) 2000. pp.25-47

Hannum Hurst, Dana D. Fischer. *Part 1: The Political Framework*. In: U.S. Ratification of the International Covenants on Human Rights. Irvington-on-Hudson, (Transnational Publishers, Inc.) 1993. pp.3-24

Husa Jaako, Kimmo Nuotio & Heikki Pihlajamäki. *Nordic Law- Between Tradition and Dynamism*. In: Nordic Law – Between Tradition and Dynamism. Antwerp, (Intersentia) 2007. pp. 1-38

Ignatieff, Michael. *Introduction: American Exceptionalism and Human Rights*. In: American Exceptionalism and Human Rights. Woodstock, (Princeton University Press) 2005. pp.1-26

Kahn, Paul W, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*. In: American Exceptionalism and Human Rights. Woodstock, (Princeton University Press) 2005. pp.198-222

Krasner, Stephen. *Sovereignty: Organized Hypocrisy*. In: International Human Rights in Context: Law Politics Morals. (Second Edition). New York, (Oxford University Press) 2000. pp.575-577

Østerud Øyvind, Per Selle. *Power and Democracy in Norway: The Transformation of Norwegian Politics*. In: Scandinavian Political Studies. 29:1 (2006), pp.25-46

Reisman, W. Michael. *Sovereignty and human rights in contemporary international law*. In: Democratic Governance and International Law. Cambridge, (Cambridge University Press) 2000. pp.239-259



Schabas, William A. *Spare the RUD or Spoil the Treaty: The United States Challenges the Human Rights Committee on Reservations*. In: *The United States and Human Rights: Looking Inward and Outward*. Lincoln, (University of Nebraska Press) 2000. pp.110-130

Scheinin, Martin. *Constitutionalism and Approaches to Rights in the Nordic Countries*. In: *Constitutionalism: New Challenges: European Law from a Nordic Perspective*. Leiden/Boston, (Martinus Nijhoff Publishers) 2008. pp.135-153

Selle Per, Øyvind Østerud. *The eroding of representative democracy in Norway*. In: *Journal of European Public Policy*. 13:4 (2006), pp.551-568

Shapiro, Martin. *Law, Courts, and Social Science: Political Jurisprudence*. In: *On Law, Politics, & Judicialization*. New York, (Oxford University Press) 2002. pp.19-55

Shelton, Dinah. *Chapter II: The Applicable Law*. In: *U.S. Ratification of the International Covenants on Human Rights*. Irvington-on-Hudson, (Transnational Publishers, Inc.) 1993. pp.25-34

Smits, Jan M. *Nordic Law in a European Context: Some comparative observations*. In: *Nordic Law – Between Tradition and Dynamism*. Antwerp, (Intersentia) 2007. pp. 55-64

Stark, Barbara. *U.S. Ratification of the Other Half of the International Bill of Rights*. In: *The United States and Human Rights: Looking Inward and Outward*. Lincoln, (University of Nebraska Press) 2000. pp.75-93

Steiner, Henry. *Political Participation as a Human Right*. In: *International Human Rights in Context: Law Politics Morals*. (Second Edition). New York, (Oxford University Press) 2000. pp.890-900

Sweet, Alec Stone. *Law, Courts, and Social Science: Judicialization and the Construction of Governance*. In: *On Law, Politics, & Judicialization*. New York, (Oxford University Press) 2002. pp. 55-90

Williams, Anne M. *United States Treaty Law*. In: *U.S. Ratification of the International Covenants on Human Rights*. Irvington-on-Hudson, (Transnational Publishers, Inc.) 1993. pp.35-50

### **Internet Sources**

OHCHR website. *Democracy*. [www.ohchr.org/english/issues/democracy/index.htm](http://www.ohchr.org/english/issues/democracy/index.htm)  
[Visited 10 October 2007]

OHCHR website. *Democracy: Challenges and Opportunities*.  
[www.ohchr.org/english/issues/democracy/challenges.htm](http://www.ohchr.org/english/issues/democracy/challenges.htm) [Visited 10 October 2007]

OHCHR website. *Democracy – Progress So Far*.  
[www.ohchr.org/english/issues/democracy/progress.htm](http://www.ohchr.org/english/issues/democracy/progress.htm) [Visited 10 October 2007]

### **Other Sources**

*Focus on Human Dignity: A Plan of Action for Human Rights*. Report No. 21 to the Storting: 1999-2000. Royal Norwegian Ministry of Foreign Affairs, Oslo (GCSM AS) 2000

Langford Malcolm, Asbjørn Eide. *Ja til overgrep?* In: *Klassekampen*. 28 April 2008

### **International Conventions and Declarations**

|      |   |
|------|---|
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination, 1966 |
|------|---|

|                     |  |
|---------------------|--|
| CESCR               | International Covenant on Economic, Social and Cultural Rights, 1966                                 |
| Charter of Paris    | The Charter of Paris for A New Europe (CSCE), 1990   |
| CoE Statute         | Statute of the Council of Europe, 1949   |
| Copenhagen Document | Document of the Copenhagen Meeting of the Second Conference of the Human Dimension of the CSCE, 1990 |
| ECHR                | Convention for the Protection of Human Rights and Fundamental Freedoms, 1950                         |
| ICCPR               | International Covenant on Civil and Political Rights, 1996   |
| ICJ Statute         | Statute of the Court of International Justice, 1945  |
| ILO-169             | Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989                   |
| Moscow Document     | Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, 1991      |
| UDHR                | Universal Declaration of Human Rights, 1948  |
| UNCharter           | The Charter of the United Nations, 1945  |
| VCLT                | Vienna Convention on the Law of Treaties, Vienna 23 May 1969   |
| Vienna              | World Conference on Human Rights: Vienna Declaration and   |

Declaration 1993      Programme of Action, 1993

Warsaw                      Warsaw Declaration from the Warsaw Summit, Council of Europe,  
Declaration                  6- 17 May 2005

### **Jurisprudence**

Folgerø and Others v. Norway no.15472/02, The European Court of Human Rights,  
Strasbourg, 29 June 2007

Gillot et al. v. France no.932/2000, Human Rights Committee, 15 July 2002

The Greek Case, Report of the Commission, Yearbook of the European Convention on  
Human Rights, 5 November 1969

Handyside v. The United Kingdom no.5493/72, The European Court of Human Rights,  
Strasbourg, 7 December 1976

Kjeldsen, Busk Madsen and Pedersen v. Denmark nos.5095/71; 5920/72; 5926/72, The  
European Court of Human Rights, Strasbourg, 7 December 1976

Mathieu-Mohin and Clerfayt v. Belgium no.9267/81, The European Court of Human  
Rights, Strasbourg, 2 March 1987

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States  
of America), The International Court of Justice, 27 June 1986

Refah Partisi (The Welfare Party) and Others v. Turkey nos.41340/98, 41342/98, 41343/98,  
41344/98, The European Court of Human Rights, Strasbourg, 13 February 2003

Tyrer v. The United Kingdom no.5856/72, The European Court of Human Rights, Strasbourg, 25 April 1978

Vito Sante Santoro v. Italy, no.36681/97, European Court of Human Rights, Strasbourg, 1 July 2004

X v. Belgium no.1065/61, Yearbook of the European Convention on Human Rights, 30 May 1961

### **General Comments and General Recommendations**

CERD GR-21      Committee of the Convention on the Elimination of all forms of Racial Discrimination, General Recommendation no. XXI: Self-determination, 1996

HRC GC-10      Human Rights Committee: General Comment No. 10: Freedom of expression (Art. 19), 1983

HRC GC-18      Human Rights Committee: General Comment No. 18: Non-discrimination, 1989

HRC GC-23      Human Rights Committee: General Comment No. 23: The rights of minorities (Art.27), 1994

HRC GC-25      Human Rights Committee: General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art.25), 1996

**United Nations Human Rights Commission Resolutions  
and General Assembly Resolutions**

GA Res. 55/96            Promoting and Consolidating Democracy  
(2000)

UNCHR                    Promotion of the right to democracy  
Res. 1999/57

UNCHR                    Promoting and consolidating democracy  
Res. 2000/47

UNCHR                    Strengthening of popular participation, equity, social justice and  
Res. 2001/36               non-discrimination as essential foundations of democracy

UNCHR                    Strengthening of popular participation, equity, social justice and non-  
Res. 2002/34               discrimination as essential foundations of democracy

UNCHR                    Interdependence between democracy and human rights  
Res. 2003/36

UNCHR                    Strengthening of popular participation, equity, social justice and  
Res. 2005/29               non-discrimination as essential foundations of democracy

UNCHR                    Democracy and the rule of law  
Res. 2005/32

## Other International Documents

|                        |   |
|------------------------|---|
| ICCPR<br>U.S. Res.     | International Covenant on Civil and Political Rights: Reservation made by the United States of America, 1992. <a href="http://www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/d7d2ef85b2fd89a0c1256aa10048ff15?OpenDocument">http://www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/d7d2ef85b2fd89a0c1256aa10048ff15?OpenDocument</a> [Visited 20 March 2008] |
| P-12 ER                | Protocol 12 Convention on Human Rights and Explanatory Report, 2000   |
| Siracusa<br>Principles | United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, 1984   |

## Other Documents from the UN or CoE

*Conclusions and Recommendations of the Expert Seminar on Democracy and the rule of law*: Expert Seminar on Democracy and the Rule of law. Palais des Nations 2 March 2005. <http://www2.ohchr.org/english/issues/democracy/docs/finalconclusions.doc> [Visited 29 March 200]

Davis, Terry. (2007, June). *Speech Given on the Occasion of the Forum for the Future of Democracy*. Stockholm, Sweden. [http://www.coe.int/t/dc/press/news/20070613\\_disc\\_sg\\_en.asp](http://www.coe.int/t/dc/press/news/20070613_disc_sg_en.asp) [Visited 15 March 2008]

*Forum for the Future of Democracy: Conclusions by the General Rapporteurs*. Stockholm, Sweden 2007. [http://www.coe.int/t/dc/press/news/20070615\\_concl\\_democracy\\_en.asp](http://www.coe.int/t/dc/press/news/20070615_concl_democracy_en.asp) [Visited 17 February 2008]

Pratchett Lawrence, Vivien Lowndes. *Developing Democracy in Europe: An analytical summary of the Council of Europe's aquis*. De Mont University, United Kingdom. 2004. [http://www.coe.int/t/e/integrated\\_projects/democracy/05\\_key\\_texts/01\\_analytical\\_summary/03\\_Developing%20Democracy.asp#TopOfPage](http://www.coe.int/t/e/integrated_projects/democracy/05_key_texts/01_analytical_summary/03_Developing%20Democracy.asp#TopOfPage) [Visited 15 March 2008]

*Other Issues: Promotion and Consolidation of Democracy: Working paper by Mr. Manuel Rodríguez Cuadros* on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy, in accordance with the mandate contained in decision 2000/116 of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/32, 5 July 2001

Vieira de Mello, Sergio. (2002, November). *Speech on Holistic Democracy: The Human Rights Content of Legitimate Governance*. Geneva, Switzerland. <http://www.unhchr.ch/democracy/hcfinal.doc> [Visited 15 March 2008]